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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1025

**NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
AND STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY, APPELLANTS.**

vs.

**THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION AND MUTUAL
BROADCASTING SYSTEM, INC.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK**

FILED MARCH 9, 1942.

SUPREME COURT OF THE UNITED STATES

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AND STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY, APPELLANTS,

v.s.

THE UNITED STATES OF AMERICA, FEDERAL
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BROADCASTING SYSTEM, INC.

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THE SOUTHERN DISTRICT OF NEW YORK

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**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

(Equitable Relief Sought)

Civil Action No. 16-178

**NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and Stromberg Carlson
Telephone Manufacturing Company, Plaintiffs,**

v.

**UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants**

COMPLAINT

To the Honorable the Judges of said District Court:

Plaintiffs, above named, bring this action pursuant to the provisions of the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)) and the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws of the United States, Title 28, Sections 41 and 43 through 48, inclusive), and under the general equitable jurisdiction of this Court, to enjoin, set aside, annul and suspend an Order of the Federal Communications Commission (hereinafter sometimes referred to as the "Commission"), dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." The Order as issued May 2, 1941 (hereinafter sometimes called the "original Order") was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance [fol.3] of more than one network by a single network organization. The Order as amended on October 11, 1941 (hereinafter sometimes called the "Order on Rehearing") was immediately effective except with respect to existing contracts, arrangements or understandings, network organ-

ization station licenses and the maintenance of more than one network by a single network organization. Insofar as the original Order and the Order on Rehearing were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941 and network organization station licenses, and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization.

Plaintiffs allege, upon information and belief:

1. Plaintiff, National Broadcasting Company, Inc. (hereinafter called NBC), is a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the City of New York, State of New York, and in the Southern District thereof.

2. Plaintiff, Woodmen of the World Life Insurance Society (hereinafter called Woodmen), is a corporation duly organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, State of Nebraska and licensed to transact its corporate business in the States of Nebraska and New York.

3. Plaintiff, Stromberg Carlson Telephone Manufacturing Company (hereinafter called Stromberg Carlson), is a corporation duly organized and existing under the laws of the State of New York.

4. The Commission is an administrative tribunal created by said Communications Act of 1934 and is charged with the administration and enforcement of said Act. The Commission was organized on July 11, 1934 and said Act [fol. 4] in so far as it relates to action by the Commission became effective on that date.

5. The United States of America is made a defendant in this suit pursuant to the provisions of said Act of Congress approved October 22, 1913 (36 Stat. 1149, 38 Stat. 219; Code of Laws of United States, Title 28, Section 46), known as the Urgent Deficiencies Act, and said Communications

Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)).

6. NBC is, and at all times since the effective date of said Communications Act of 1934 has been, a corporation engaged in radio broadcasting and in radio network broadcasting in interstate and foreign commerce and subject to the provisions of said Act.

7. Woodmen and Stromberg Carlson, respectively, are, and at all times hereinafter referred to have been, engaged respectively, in radio broadcasting and in radio network broadcasting in interstate or foreign commerce and subject to the provisions of said Communications Act of 1934.

8. NBC is the owner and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
WEAF	New York, N. Y.	1926
WJZ	New York, N. Y.	1930
WRC	Washington, D. C.	1930
WTAM	Cleveland, Ohio	1930
KPO	San Francisco, Calif.	1932
WMAQ	Chicago, Ill.	1931
WENR	Chicago, Ill.	1931

NBC acquired Station WJZ from Radio Corporation of America which had become sole owner of said station on or about May 15, 1923 and had used the same as its key station for network broadcasting, beginning as early as December, 1923.

[for 5] 9. NBC is the lessee and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
KOA	Denver, Colo.	1930
KGO	San Francisco, Calif.	1930
WMAL	Washington, D. C.	1933

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10. The license for each of the Stations operated by NBC (except that for Station WEAJ, New York, N. Y., which was acquired prior to the enactment of the Radio Act of 1927) has been acquired after NBC made application to the Federal Radio Commission (the predecessor of the Federal Communications Commission as a licensing authority) for a transfer thereof to NBC, and in each instance the Federal Radio Commission acting under the provisions of Section 12 of the Radio Act of 1927 (44 Stat. 1167) granted its consent to the assignment of the license to NBC as requested after having found that public interest, convenience or necessity would be served thereby. In each instance NBC has been granted successive renewals of these licenses (for example, NBC has received 28 renewals of its license for station WEAJ for periods ranging between approximately three months and one year) both by the Federal Radio Commission and the Federal Communications Commission upon findings as required by statute (44 Stat. 1167; 48 Stat. 1085) that the public interest, convenience or necessity would be served thereby. NBC is now, and at all times since 1927 has been, qualified legally, financially, technically, by experience and in all other respects to operate each of said stations.

11. The broadcast transmitters operated by NBC, as aforesaid, exclusive of studios and other properties, represent an investment by NBC in assets (other than good will) having a present value of over \$1,000,000. All of the stations operated by NBC are going concerns which during their many years of operation by NBC have created values [fol. 6] for NBC in excess of \$1,000,000, in good will and NBC has also paid large sums of money for the good will value of certain of said stations at the time the same were acquired by NBC.

12. Woodmen is the owner and operator (under a license from the Commission) of standard broadcast station WOW, located at Omaha, Nebraska, which Woodmen has been licensed to operate since 1923.

13. Woodmen has been granted successive renewals of its license to operate Station WOW by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the

public interest, convenience or necessity would be served thereby, and Woodmen is now, and at all times since 1923 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said station.

14. Station WOW, owned and operated by Woodmen as aforesaid, represents an investment by Woodmen in assets (other than good will) having a present value in excess of \$175,000, and said Station WOW is a going concern which, during its 18 years of operation by Woodmen, has created values for Woodmen of over \$500,000 in good will.

15. Stromberg Carlson is the owner and operator (under a license from the Commission) of standard broadcast station WHAM, located at Rochester, New York, which Stromberg Carlson has been licensed to operate since 1927.

16. Stromberg Carlson acquired said Station WHAM by purchase from the prior owner and operator thereof. Stromberg Carlson has been granted successive renewals of its said license to operate Station WHAM both by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the public interest, convenience or necessity would be served thereby.

[fol. 7] 17. Stromberg Carlson is now, and at all times since 1927 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said Station WHAM.

18. Station WHAM, owned and operated by Stromberg Carlson as aforesaid, represents an investment by said Stromberg Carlson in assets (other than good will) having a present value in excess of \$250,000, and said Station WHAM is a going concern which, during its 14 years of operation by Stromberg Carlson, has created values for Stromberg Carlson of over \$1,000,000 in good will.

19. In addition to its operation of radio broadcast stations, as aforesaid, NBC is and since 1926 has been engaged in the business of network broadcasting; i.e., it creates and supplies programs over leased telephone wire circuits simultaneously to stations which NBC itself operates and

to standard broadcast stations (now numbering more than 200) owned and operated by other persons, firms, or corporations in the United States and Canada. NBC maintains studios and offices in New York, Washington, Chicago, Los Angeles, and other important cities within the United States from which it conducts its said business of network broadcasting and also maintains offices and has employees in many other cities and countries throughout the world. NBC's employees include experienced engineering, sales, program and executive personnel, the total number thereof being in excess of 2,300, many of whom have entered into contracts of employment with NBC requiring NBC to pay out large sums of money as salaries thereunder. NBC owns real property and leases additional real property within and without the United States and is the owner of personal property used and usable in the conduct of its broadcasting and network broadcasting business. NBC's commitments under leases of real property alone are in excess of \$15,000,000. The present value of studio, office and other properties and assets, owned by NBC (exclusive of broadcast transmitters and good will) is in excess of {fol. 8} \$3,000,000, and its network activities have created good will values of more than \$10,000,000 additional.

20. NBC's business of network broadcasting is conducted by means of contracts between NBC and the operators of independently owned standard broadcast stations, including Woodmen and Stromberg Carlson, on the one hand and between NBC and advertisers on the other hand. NBC has contracts with the owners of most of the standard broadcast stations which broadcast NBC's network programs (except those stations which NBC itself operates) which fix the rights and obligations of the parties in the handling and broadcasting of such programs as hereinafter more fully appears. NBC has contracts with advertisers and advertising agencies for the use of NBC's network facilities to advertise their products, covering advertising commitments, subject to the provisions of said contracts, in an amount in excess of \$28,000,000. NBC has contracts with artists and other skilled personnel to produce and distribute its radio programs to its affiliated network stations pursuant to such contracts.

21. NBC's ability to render a national network service is dependent upon the contracts existing between it and

the owners of independently owned standard broadcast stations which broadcast its network programs. The ability of the owners of standard broadcast stations affiliated with NBC, including Woodmen and Stromberg Carlson, to furnish their respective listeners with NBC's network programs, both commercial and sustaining, is also dependent upon said contracts. Said contracts are in writing and while similar in substance are not in all respects uniform. In most cases, they provide in effect that for the period of time therein specified: (1) NBC will supply to the station sustaining programs (*i. e.*, programs of entertainment, information, education, news, national and international events and other features not containing advertising material), which programs NBC either itself produces in its own studios and delivers to the station, or delivers to the station from some other point at which the program originates; (2) the station will broadcast commercial programs serving the public interest, convenience and necessity supplied by NBC (*i. e.*, programs of entertainment, information, education, news and other features but also containing advertising material) to the station and NBC will pay the station for the broadcasting of such programs at a rate specified; and (3) the station grants to NBC an option on certain specified periods of the time for which the station is licensed to operate, for the broadcast of commercial network programs. Said provisions are contained in each of said contracts substantially in the form contained in the form of affiliation contract attached hereto as Exhibit A and made a part hereof as fully as though the same were set out herein.

22. Through and by means of the contractual relationship between NBC and individual station owners who broadcast NBC's network programs, including Woodmen and Stromberg Carlson, NBC is now able to render a nationwide network service which has gained wide public acceptance and which is relied upon by NBC's affiliated stations both as a source of revenue and as a source of program material. Through such contractual arrangements, the affiliated stations, including WOW and WHAM, receive: (1) the audience appeal of programs supplied by NBC and which are not otherwise available to the individual stations; (2) sustaining programs which are used by the individual stations to complete their program schedules thereby sav-

ing them the expense of producing programs for this purpose; and (3) revenue for the sale of the facilities of the stations to advertisers by NBC. Through such contractual arrangements, NBC receives: (a) circulation for commercial programs within the particular market in which the individual station is located; (b) revenue for making such stations available to an advertiser using the network; and (c) an opportunity to build audience appeal in a particular market through the use of NBC's sustaining programs by the station located in that market.

[fol. 10] 23. NBC's network operations are and since 1927 have been conducted over two groups of standard broadcast stations which are commonly known, and hereafter referred to, as the "Red" and "Blue" networks. In broadcasting radio programs, the Red network and the Blue network generally operate as separate networks, and one program will be broadcast from the group of stations comprising the Red network while a different program is simultaneously broadcast from the group of stations comprising the Blue network, although in exceptional cases the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope so that there is a substantial overlap in the territories served by them. The stations which NBC itself operates are divided between the Red and Blue networks in the following manner:

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL
KPO	San Francisco, Cal.	KGO
KOA	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

All of the stations which are owned and operated by others but which are affiliated with NBC in the business of network broadcasting are associated with the Red network or the Blue network or both. Station WOW is associated with the Red network and Station WHAM is associated with the Blue network. The map-chart attached hereto as Exhibit B, which is made a part hereof as fully as though it were set out herein, shows the network association as of June 1, 1941 of all stations owned and operated by, or affiliated with, NBC. As shown by the legend on Exhibit B,

stations colored red therein are associated with the Red network, stations colored blue therein are associated with the Blue network and stations colored green therein are included in supplementary groups of stations which from time to time may be associated with the Red or Blue networks.

[fol. 11] 24. NBC, Woodmen and Stromberg Carlson, respectively, allege that each of the stations that they, respectively, operate has been operated in accordance with all applicable statutes and all lawful regulations promulgated by the Commission and that each of said stations is now and at all times referred to herein has been rendering a high quality broadcast service, in accordance with the terms and provisions of the licenses authorizing its operation and in all respects conducive to the public interest, convenience and necessity.

25. NBC further alleges that its contracts with its affiliates, including Woodmen and Stromberg Carlson, are in all respects lawful, are contracts under which NBC and said affiliates are co-venturers in the business of network broadcasting and are contracts under which both NBC and said affiliates have been able to render a greater service in the public interest than would have been possible without such contracts.

26. The Commission on March 18, 1938 entered its Order No. 37, of the same date, which authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity," a copy of which Order is attached hereto as Exhibit C and made a part hereof as fully as though it were set out herein. Hearings were thereafter held and the Commission entered a Report setting forth its findings and conclusions and its original Order in Docket No. 5060, dated May 2, 1941, upon notice to NBC and other interested parties, a copy of which Report and Order is attached hereto as Exhibit D and made a part hereof as fully as though it were set out herein.

27. By the terms and provisions of its original Order in Docket No. 5060, the Commission promulgated eight regulations of general application which purport to be "special regulations applicable to radio stations engaged in

[fol. 12] chain broadcasting," having the force and effect of law. Two of the six Commissioners dissented. On September 12, 1941, upon notice to NBC and other interested parties, a rehearing was held and thereafter, on October 11, 1941, the Commission issued a Supplemental Report and the Order on Rehearing in Docket No. 5060, amending three of the eight regulations aforesaid, a copy of which Report and Order is attached hereto as Exhibit E and made a part hereof as fully as though it were set out herein. Again, two Commissioners dissented. A copy of the eight regulations promulgated on May 2, 1941, as amended October 11, 1941, is attached hereto as Exhibit F and made a part hereof as fully as though the same were set out herein. All broadcast stations operated by and affiliated with NBC, including Stations WOW and WHAM, are standard broadcast stations engaged in chain broadcasting. All of said regulations have application to the business in which NBC, Woodmen and Stromberg Carlson, respectively, are engaged, either as the operator of one or more broadcast stations or in the conduct of NBC's network business, and all of said regulations adversely affect NBC, Woodmen and Stromberg Carlson.

28. Paragraph 3.101 of the original Order requires the abrogation of any provision contained in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station agrees not to broadcast network programs of any network organization other than NBC and said paragraph was not amended by the Order on Rehearing.

29. Paragraph 3.102 of the original Order, as amended by the Order on Rehearing, requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station obtains exclusive rights in a particular area to the programs of NBC, provided that NBC may grant to a station first call upon the programs of NBC in the station's primary service area.

[fol. 13] 30. Paragraph 3.103 of the original Order required the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period of longer than one year.

31. Paragraph 3.103 of the Order on Rehearing requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period longer than two years.

32. Paragraph 3.104 of the original Order required the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations, whereunder said station gives NBC a firm option on any part of said station's broadcast time.

33. Paragraph 3.104 of the Order on Rehearing also requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station gives NBC a firm option on any part of said station's broadcast time. Said paragraph prohibits the station from agreeing to clear its time of non-network programs for NBC upon less than 56 days notice and prohibits the station from agreeing to clear its time of the programs of other network organizations for NBC under any circumstances. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen and NBC's contract with Stromberg Carlson, contain a provision giving a firm option to NBC on the respective station's time for not less than eight hours per day upon 28 days notice.

34. Paragraph 3.105 of the original Order requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated [fol. 14] standard broadcast stations which does not reserve to said station the right to reject any network program which said station reasonably believes to be unsatisfactory or unsuitable and said paragraph was not amended by the Order on Rehearing. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen, contain a provision reserving to said station the right to reject any network program solely upon the ground that the broadcasting thereof would not be in the public interest, convenience and necessity.

35. Paragraph 3.108 of the original Order requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station is prevented or hindered from or penalized for fixing or altering its rates for the sale of broadcast time for other than said networks' programs and said paragraph was not amended by the Order on Rehearing.

36. The necessary effect of the Order is to require the abrogation or modification of each of the contract provisions between NBC and its affiliated standard broadcast stations described in paragraphs 33 and 34 of this complaint. The Order also prevents the inclusion of any contract provision substantially similar to any of those described in paragraphs 28 through 35, inclusive, of this complaint in any new contract between NBC and any standard broadcast station. Such requirements as imposed by the Commission in the Order would disrupt the ordinary course of NBC's, Woodmen's and Stromberg Carlson's respective businesses as corporations engaged in radio broadcasting and radio network broadcasting, would damage NBC by loss of revenues in an amount in excess of \$1,000,000 per year and would damage Woodmen and Stromberg Carlson, respectively, by loss of revenues under their affiliation contracts with NBC in an amount in excess of \$100,000 per year each.

[fol. 15] 37. Paragraph 3.106 of the original Order requires NBC to dispose of (a) all standard broadcast stations in excess of one covering substantially the same service area and (b) any standard broadcast station in any locality where existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that "competition would be substantially restrained" by the continued ownership of said station by NBC and said paragraph was not amended by the Order on Rehearing. NBC presently operates two stations covering substantially the same service area in each of four cities within the United States, namely, New York, Washington, Chicago and San Francisco. NBC also operates a single station in two other cities, namely, Cleveland and Denver, which said stations in terms of coverage, power, frequency, program quality and in other respects are pre-

ferred by listeners and by advertisers over some, if not all, of the other stations located in such cities.

38. The necessary effect of paragraph 3.106 of the Order, as the Order is construed by the Commission in its Report (Exhibit D), is to require NBC to dispose of not less than four of the stations owned or operated by NBC. Such requirement as imposed by the Commission in the Order would terminate or would disrupt and injure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and would disrupt and injure Woodmen's and Stromberg Carlson's respective businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the damage of NBC by loss of revenues in an amount in excess of \$1,000,000 per year and to the damage of Woodmen and Stromberg Carlson.

39. Paragraph 3.107 of the original Order requires each and every standard broadcast station affiliated with a network organization which maintains more than one network, if such networks are operated simultaneously or if there is a substantial overlap in the territory served by the group of stations comprising each such network, to terminate such [fol. 16] affiliation. NBC is a network organization within the meaning of Paragraph 3.107 and the Red and Blue networks now operated by NBC are nation-wide in scope, are operated simultaneously, and there is a substantial overlap in the territory served by the Red and Blue networks, respectively.

40. The necessary effect of paragraph 3.107 of the Commission's Order in Docket No. 5060 would be to require the operator of each and every standard broadcast station affiliated with NBC, including Woodmen and Stromberg Carlson, to terminate its contract of affiliation with NBC, or, in the alternative, to require NBC to dispose of its Red or its Blue network. As hereinabove stated, the effective date of paragraph 3.107 was indefinitely postponed by the Commission on October 11, 1941, but the assertion of power by the Commission contained in paragraph 3.107 has the necessary effect of rendering uncertain and less valuable the operation by NBC of both its Red and its Blue networks and this effect has not been alleviated by the indefinite postponement of the effective date of said paragraph. Such asser-

tion of power by the Commission, notwithstanding the indefinite postponement of said effective date, will injure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and will disrupt and injure Woodmen's and Stromberg Carlson's businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the great damage of NBC, Woodmen and Stromberg Carlson.

41. Plaintiffs allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose, for each of the following reasons:

(a) The Commission entered the Order upon the basis of considerations and standards not fixed or prescribed by the Communications Act of 1934 and upon which the Commission has no power or authority to pass.

[fol. 17] (b) The Commission is without authority under Sections 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 or under any other Section of said Act, to prescribe the terms of contracts, arrangements or understandings between operators of standard broadcast stations, including Woodmen and Stromberg Carlson, and NBC; or to prohibit ownership by a network organization of more than one station in any given locality or the ownership by a network organization of one of a few stations or the most desirable station in a given locality; or to deprive a standard broadcast station of the right to be affiliated with a network organization which maintains more than one network.

(c) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of standard broadcast stations, including Stations WOW and WHAM and the stations owned and operated by NBC, different from and at variance with the rule prescribed by Section 307(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

(d) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of such standard broadcast stations different from and at variance with the rule prescribed by Section 309(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

42. Sections 307(a) and 309(a) of said Communications Act of 1934 provide, in substance, that the Commission shall grant a station license provided for by said Act if public convenience, interest or necessity will be served thereby. The Commission is not authorized by said Act, nor by any law of the United States, to grant or deny such station license upon any other standard.

[fol. 18] 43. Plaintiffs allege that each and every numbered paragraph contained in the Order is void and beyond the power and authority of the Commission to impose for the reason that said paragraphs of the Order specify, in substance, that station licenses provided for by said Act shall be denied to any standard broadcast station and to any network organization described therein solely upon the ground that said station has an affiliation contract with a network organization containing any one or more of the provisions described in said paragraphs (as stated in paragraphs 28 through 35 of this Complaint), or that said network organization owns certain facilities described in paragraphs 3.106 and 3.107 of the Order (as stated in paragraphs 37 and 39 of this Complaint), without regard to whether the public interest, convenience or necessity will be served by the granting of each such license.

44. Plaintiffs further allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose for the reason that the Order is arbitrary and capricious and contrary to the public interest.

45. Plaintiffs further allege that if Section 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 are to be construed, separately or collectively, as authorizing or empowering the Commission to issue the Order, then said provisions, and each of them, are unconstitutional and void in that they constitute a delegation of legislative power to the Commission in violation of Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States.

46. Plaintiffs further allege that the Order, if authorized by any provision of the Communications Act of 1934, deprives each of them of its property without due process of law contrary to the Fifth Amendment of the Constitution of the United States.

[fol. 19] 47. The Commission is threatening to enforce the Order, in so far as the Order purports to become effective on or before November 15, 1941, by proceeding for the revocation of station licenses and otherwise, and if Plaintiffs do not comply therewith, each of them will suffer irreparable damage and injury and will also be subjected to loss of its broadcasting license or licenses.

48. Plaintiffs further allege that the Order already has had, and will continue to have, the effect of working irreparable damage and injury upon each of them in the conduct of its business; that because of the provisions of the Order, NBC is unable to negotiate or enter into contracts containing provisions necessary to its network operations or renewals of such contracts with operators of standard broadcast stations, including Woodmen and Stromberg Carlson, which would otherwise enter into or renew such contracts of affiliation with NBC's network organization; that because of the Order, standard broadcast stations now affiliated with NBC under contracts entered into prior to May 2, 1941, are desirous of abrogating said contracts, not less than 48 such stations having served notice of such abrogation; that as a result of the Order, the value of the standard broadcast stations and network organizations now owned and operated by NBC and the value of the standard broadcast stations owned by Woodmen and Stromberg Carlson have diminished, and will continue to diminish; that as a result of the Order, certain advertisers have refused to renew existing contracts and have refused to enter into new contracts for the use of NBC's network facilities; and that the necessary effect of the Order upon the businesses of NBC, Woodmen and Stromberg Carlson as persons engaged, respectively, in radio network broadcasting has been, and will continue to be, such as to render impossible the proper and efficient conduct of such business.

49. NBC, Woodmen and Stromberg Carlson, respectively, have no adequate remedy at law and no method of proceeding exists for the review of the Order except by this action.

[fol. 20] Wherefore, plaintiffs pray:

1. That a summons issue under the seal of this Honorable Court and a copy of said summons and of this Complaint be served upon the United States and the Federal

Communications Commission as prescribed by Rule 4(d) (4) and 4(d) (5) of the Federal Rules of Civil Procedure.

2. That this Court, as soon as practicable, convene a specially constituted court of three judges as required by Title 28, Section 47, of the Code of Laws of the United States, and that a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of this Court, the operation, execution, and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941.

3. That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction, a preliminary restraining order be issued in terms restraining, enjoining and suspending the operation, execution and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941, until said application for a temporary or interlocutory injunction shall have been heard and determined and for a period of ninety days thereafter.

4. That after final hearing, this Court adjudge, order and decree that the Order, in so far as the Order purports to become effective on or before November 15, 1941, is, and has at all times been, beyond the lawful authority of the Commission, in violation of the legal rights of Plaintiffs, wholly void, and arbitrary and unreasonable and that the Order, in so far as the Order purports to become effective on or before November 15, 1941, be perpetually vacated, set aside, suspended and annulled and the enforcement thereof perpetually restrained and enjoined.

[fol. 21] 5. That Plaintiffs may have such other and further relief in the premises as to equity and justice may appertain and as may be deemed by this Court to be adequate and proper under the circumstances.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.
 Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., Of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fols. 22-24] *Duly sworn to by Niles Trammell et al. Jurats omitted in printing.*

[fol. 25] EXHIBIT "A" TO COMPLAINT

National Broadcasting Company, Inc.

New York, N. Y., —, 19—.

Radio Station —

GENTLEMEN:

We are proposing in this letter the following plan of network cooperation between this Company and your Station —.

I. Network Affiliation and Program Service

(1) In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and

special events programs. We will offer to furnish your station a minimum of 200 unit hours* of our network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth in Section II, Paragraph (1) sub-division (a) of this letter for network commercial programs for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we will offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship or used for any other purpose.

(2) In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28-day period.

II. Station Compensation

(1) Beginning with the effective date of this agreement, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day

* Unit hours are computed according to the following table:

Local Time	1 Hour Unit Hour Credit	$\frac{3}{4}$ Hour Unit Hour Credit	$\frac{1}{2}$ Hour Unit Hour Credit	$\frac{1}{4}$ Hour Unit Hour Credit
Weekdays:				
12:00 Mid. to 8:00 A. M.	333	250	167	083
8:00 A. M. to 3:00 P. M.	500	375	250	125
6:00 P. M. to 11:00 P. M.	1.000	750	500	250
11:00 P. M. to 12:00 Mid. ....	.500	375	250	125
Sundays:				
12:00 Mid. to 8:00 A. M.	333	250	167	083
8:00 A. M. to 12:00 Noon	500	375	250	125
12:00 Noon to 6:00 P. M.	750	562	375	188
6:00 P. M. to 11:00 P. M.	1.000	750	500	250
11:00 P. M. to 12:00 Mid. ....	.500	375	250	125

period by dividing the total value at the network rate for your station of the network commercial programs broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½% of your average unit hour rate for the 28-day period.

[fol. 27] (2) The network station rate for your station, on which its compensation will be figured as provided above, will be \$—— per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your station. Rates for other hours and for shorter periods will be as follows:

Local Time at Station	1 Hour Network Station Rate	¾ Hour Network Station Rate	½ Hour Network Station Rate	¼ Hour Network Station Rate
Daily Except Sunday:				
12:00 Mid. to 8:00 A. M.—				
8:00 A. M. to 6:00 P. M.—				
6:00 P. M. to 11:00 P. M.—				
11:00 P. M. to 12:00 Mid.—				

Sunday:

12:00 Mid. to 8:00 A. M.—
8:00 A. M. to 12:00 Noon—
12:00 Noon to 6:00 P. M.—
6:00 P. M. to 11:00 P. M.—
11:00 P. M. to 12:00 Mid.—

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. It is our policy,

however, to allow advertisers using a block of time, even though it be broken into half-hour and/or quarter-hour contiguous periods for the purpose of advertising separate products, the benefit of the rate applicable to the entire block of time, in which event the rate for your station for such entire block of time will be used in computing the compensation due your station.

(3) NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

(a) If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

(b) Except as provided in subsection (c) of this paragraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within ninety days after the receipt of our notice to you to so reduce your compensation.

(c) If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you ninety days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within thirty days after the receipt of our notice to you to so reduce your compensation.

III. Network Optional Time

(1) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

[fol. 29] Network Optional Time will be as follows:

(New York City Time)

Weekdays	Sundays
10:00 A. M. to 12:00 Noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

(2) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued program for which we substitute another network commercial program. Nothing in this paragraph shall entitle you to compensation as a result of our changing a network program, without 28 days' advance notice, to a time in network optional time for which your station is not already committed to carry a commercial broadcast.

(3) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public importance. No compensation will be paid for the cancelled program or for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. Announcement Services

(1) You agree to supply upon order from us the services of such personnel and the use of such equipment as

may be necessary to broadcast, either from your station alone or from your station and to a network of stations, any announcements we may request on any network commercial program broadcast from your station, provided such order is received by you not less than 48 hours in advance of the program on which the announcement is to be made.

(2) Either simultaneously with the placing of such order by us or as soon thereafter as possible, we agree to supply you with the text of such announcements, or a recording of such announcements, together with the necessary instructions as to the time and place in our network program during which we desire such announcements to be made (either by your announcer or by means of the recording) and you agree to make such announcements in accordance with our instructions. It is understood, of course, you may refuse to broadcast any announcements the broadcasting of which would not be in the public interest, convenience and necessity.

(3) We may cancel any such order for announcements without liability on our part provided we do so upon not less than 48 hours' notice to you, failing which we will pay you the compensation you would have received if the announcements had continued as scheduled for 48 hours following receipt by you of such notice of cancellation.

(4) During a network commercial program which you have agreed to broadcast you agree not to broadcast without our consent any commercial announcements from your station.

(5) As compensation for these announcement services we agree to pay you on approximately the fifteenth day of each calendar month, for each program broadcast by you during the immediately preceding calendar month on which such announcement services are rendered by you at our request, 7½% of your hourly network station rate, applicable to the hour at your station during which such program was scheduled to start.

[fol. 31] V. General

(1) You will submit to NBC daily reports, upon forms provided by us, of all network programs broadcast by your

station and of all announcements broadcast by you under the provisions of Section IV hereof.

(2) You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder.

(3) Neither you nor ourselves shall incur any liability hereunder because of our failure to deliver or your failure to broadcast any or all programs due to (a) failure of facilities, (b) labor disputes, or (c) causes beyond the control of the party so failing to deliver or to broadcast.

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station are changed at any time so that your station is less valuable to NBC as a network outlet than it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) You agree to keep the operation of the broadcasting equipment of your station entirely under your control for the period during which you are licensed to operate your station. You agree not to assign your station license unless such assignment is expressly made subject to this agreement.

(6) You agree not to authorize, cause, permit, or enable anything to be done whereby any program which we supply to you hereunder may be used for any purpose other than broadcasting by your station.

(7) You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

[fol. 32] (8) No waiver by either of us of any breach of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision.

(9) This agreement shall be construed in accordance with the laws of the State of New York.

(10) Any arrangement with your station relates only to NBC and your station is not related to any arrangement

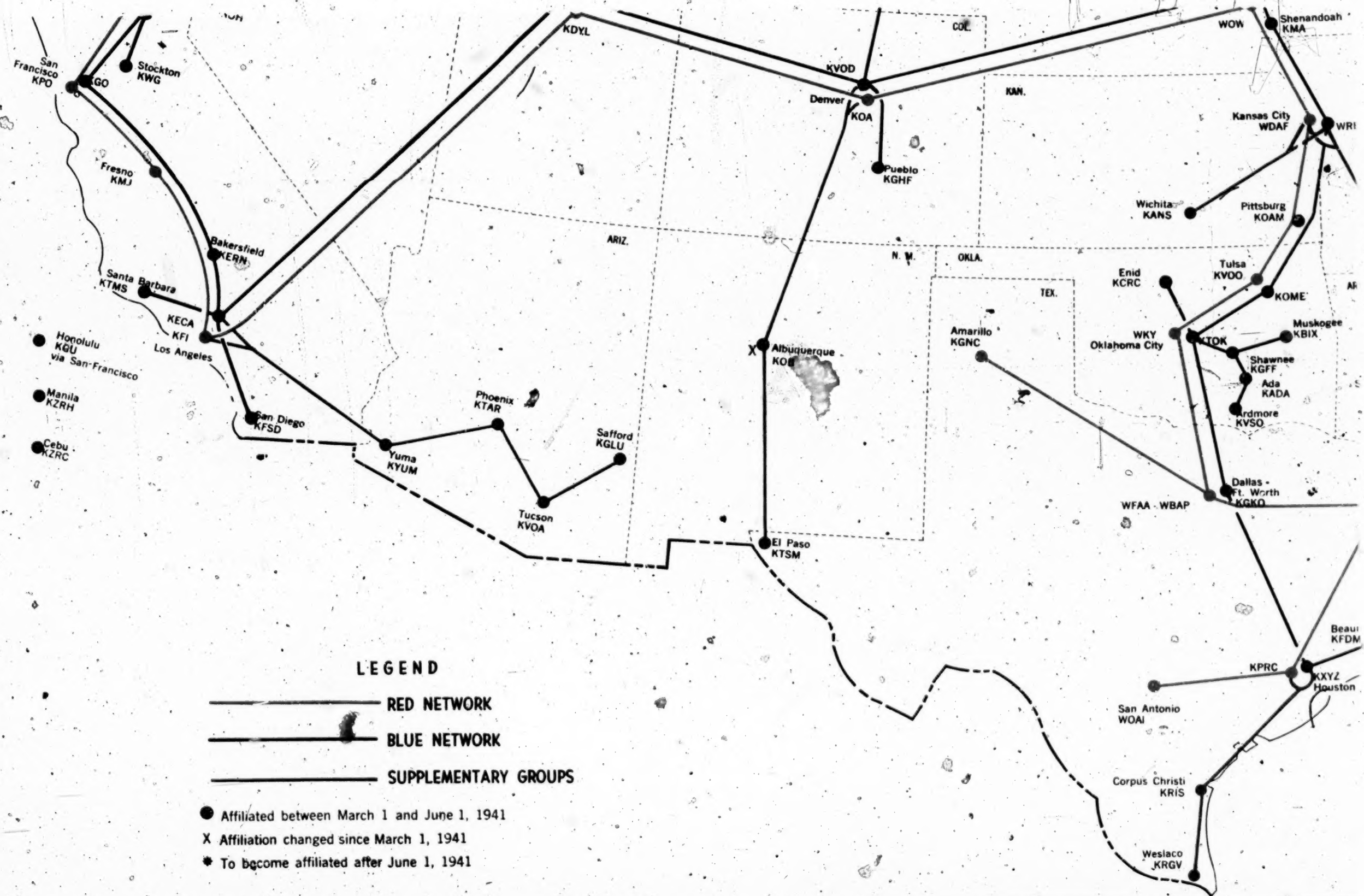
that exists or may later be made between NBC and any other station.

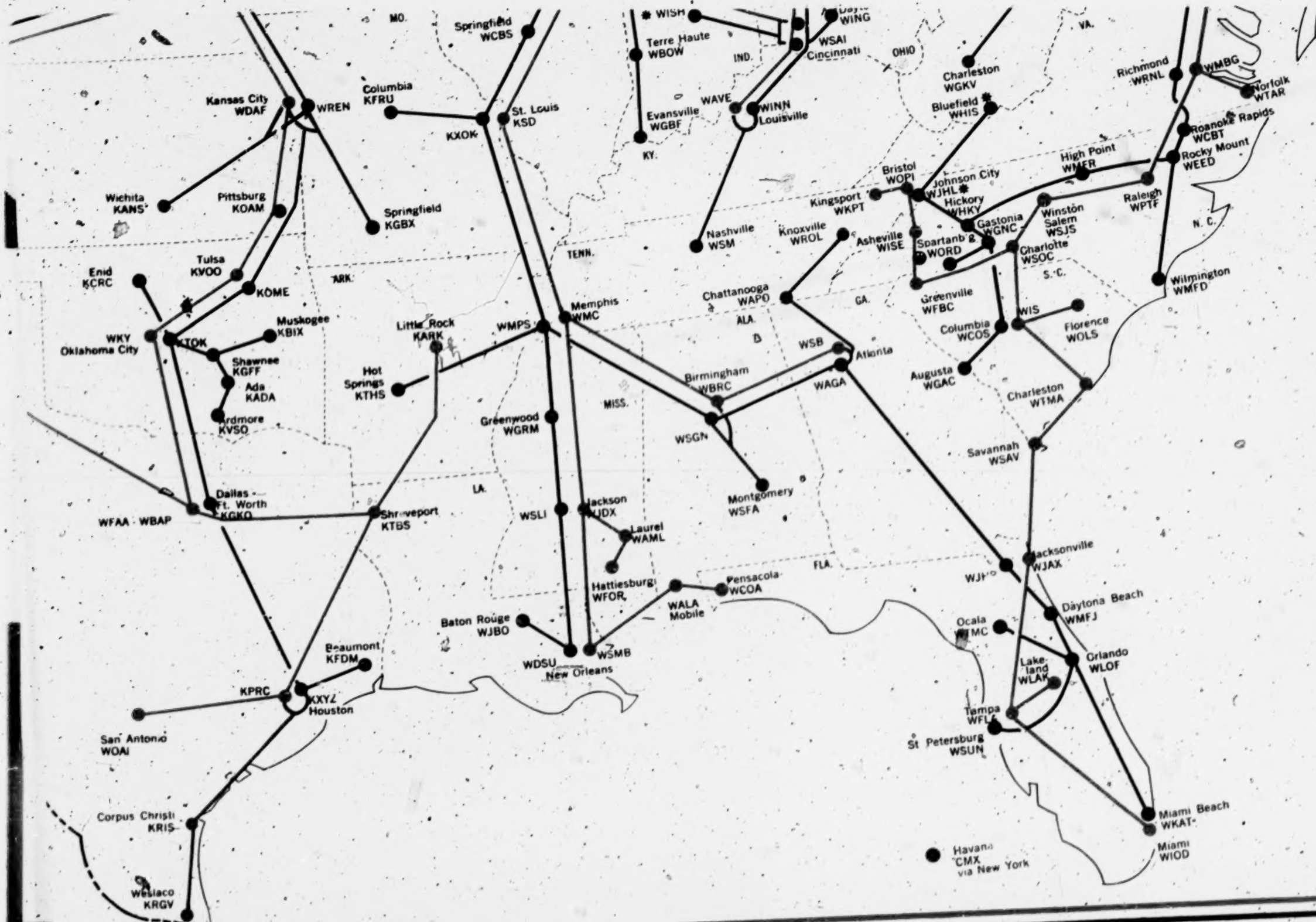
(11) This agreement shall become effective at 3:00 A. M., EST, on the — day of —, 194—, and it shall continue for — years thereafter.

If, after examination, you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours, National Broadcasting Company, Inc., By—. Accepted this — day of —, 194—. By—.

(Here follows 1 map, Exhibit B, side folio 33)





Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relations between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It Is Ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.

[fol. 35] 3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

[fol. 36] 13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It Is Further Ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary.

REPORT ON CHAIN BROADCASTING



**FEDERAL
COMMUNICATIONS
COMMISSION**

COMMISSION ORDER No. 37 • DOCKET No. 5060

MAY 1941

REPORT

31

ON

CHAIN BROADCASTING



**FEDERAL
COMMUNICATIONS
COMMISSION**

COMMISSION ORDER No. 37 • DOCKET No. 5060

MAY 1941

FEDERAL "COMMUNICATIONS COMMISSION

JAMES LAWRENCE FLY, *Chairman*
PAUL A. WALKER
NORMAN S. CASE
T. A. M. CRAVEN
GEORGE HENRY PAYNE
FREDERICK L. THOMPSON
RAY C. WAKEFIELD

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FEDERAL COMMUNICATIONS COMMISSION

REPORT ON CHAIN BROADCASTING

[Pursuant to Commission Order No. 37]

Docket No. 5060

By the Commission (Chairman Fly., Commissioners Walker, Payne, Thompson, and Wakefield; Commissioners Case and Craven dissenting).

(vi)

INTRODUCTION

A. HISTORY OF PROCEEDINGS

The Federal Communications Commission on March 18, 1938, by Order No. 37,¹ authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity." On April 6, 1938, a committee of three Commissioners² was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."³

The Commission's order authorizing the investigation covered the following matters, among others: The contractual rights and obligations of stations engaged in chain broadcasting under network agreements; the extent of control over programs and advertising contracts exercised in practice by stations engaged in chain broadcasting; duplication of network programs in the same areas; exclusive contracts restricting stations to one chain service and chain services to one station in a given area; the extent to which single chains have exclusive coverage in particular areas; the policies of networks with respect to character of programs, diversification, and accommodation to the requirements of areas served; the number of stations licensed to or affiliated with each network and the amount of station time controlled and used by networks; rights and obligations of stations in relation to advertisers having network contracts; the nature of the service rendered by stations licensed to networks; competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not engaged in chain broadcasting; practices or agreements in restraint of trade or in furtherance of monopoly in connection with chain broadcasting; and the extent and effect of concentration of control of stations locally, regionally, or nationally, through contracts, common ownership, or by other means.

Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionnaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. On June 12, 1940, the committee issued its report⁴

¹ Order No. 37 is attached to this report as Appendix A.

² The then chairman, Mr. McNinch, was made an ex-officio member of the committee. Chairman Fly did not take his place as an ex-officio member.

³ See F. C. C. Release No. 26434, April 6, 1938.

⁴ Hereinafter referred to as the committee report. The committee's memorandum of submittal and chapter VI of the committee report containing its conclusions and recommendations, are attached hereto as Appendix B.

based upon the evidence adduced at the hearings and the official records of the Commission.

In November 1940 briefs in this proceeding were filed on behalf of the national networks and other interested parties. On December 2 and 3, 1940, oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued solely for the purpose of giving scope and direction to the oral arguments.⁵ On January 2, 1941, supplementary briefs were filed on behalf of the three national network organizations in which were discussed the jurisdiction of this Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

B. SCOPE OF THIS REPORT

While the investigation as prescribed by Order No. 37 was not limited to chain broadcasting,⁶ network operations were the principal subject of inquiry.⁷ The great bulk of the testimony at the hearings dealt with network matters, and the committee report deals largely with these matters. The committee's memorandum submitting its report, however, directed our attention to two other problems.

The first of these is the ownership of more than one station by a single individual or corporation.⁸ The Commission has had and still has frequent occasion to deal with this question in its administration of the station licensing provisions of the Communications Act. In the rules recently promulgated for frequency modulation (FM) and for television, we have established rules restricting multiple ownership of stations furnishing these new broadcast services.⁹ Although the rules covering standard broadcast service do not contain comparable provisions, the Commission is working out a policy in its day-to-day decisions.¹⁰

The other nonnetwork matter to which the committee directed our attention is the problem created by the fact that the stock of some corporate licensees is listed on stock exchanges. This problem relates not only to the administration of section 310 (b) of the Communications Act governing the transfer or assignment of radio stations, but also to the enforcement of section 310 (a), prohibiting alien ownership or control of radio stations beyond certain limits. A number of stations are owned or controlled by large corporations whose stock is listed on stock exchanges and is widely held. The Commission is giving careful consideration to the problem in order to insure observance of section 310.

The committee did not make specific recommendations with respect to either of these two matters, but indicated that the Commission

⁵ A copy of the release of the Commission containing the draft regulations is attached to this report as Appendix C.

⁶ The investigation was ordered "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity."

⁷ Of the 13 specific matters for investigation listed in the order, all but one (No. 13) relate directly to chain broadcasting.

⁸ The general question of multiple ownership of radio stations should not be confused with network ownership of stations which is treated at length in chs. VI and VII.

⁹ See rule 3.230 (multiple ownership of high frequency stations) and rule 4.226 (multiple ownership of television stations).

¹⁰ See, e. g., *In the Matter of South Beach*, Tribune, March 1, 1941, File No. B4-P-900.

should give consideration to them in the light of administrative experience and should suggest to Congress the enactment of amendatory legislation, if later found to be necessary. In this report we do not attempt to solve these difficult questions. They are receiving continuing attention in our administration of the provisions of the Communications Act and may, indeed, warrant further special study.¹¹

Accordingly, this report is devoted largely to the chain broadcasting matters with which the committee report is primarily concerned. The views expressed and the regulations adopted herein are, we believe, fully supported by the evidence adduced at the hearings by the networks and other interested parties. With respect to such matters as the present allocation and ownership of particular broadcasting facilities, we have utilized our current official records. The historical data in the early chapters includes matters of common knowledge or of public record. In a proceeding of this character, there is no reason to exclude such matters or records from consideration.

C. NATURE AND SIGNIFICANCE OF CHAIN BROADCASTING

Chain broadcasting is defined in section 3(p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." It is technically accomplished at present by transmitting the program by wire, usually leased telephone lines, from its point of origination to each of the outlet stations of the chain or network for simultaneous broadcasting. The outlets are in certain highly important cases owned by the networks themselves, but more commonly they are independently owned and are affiliated with the networks by means of a network affiliation contract.

There are at present three organizations operating four network systems of national scope, and a number of organizations operating network systems of a regional character. The largest and oldest national organization is the National Broadcasting Company, Inc.,¹² founded in 1926, a subsidiary of the Radio Corporation of America.¹³ NBC operates two network systems, known as the "Red" and "Blue" networks. Second in size, and established a year after NBC, is the Columbia Broadcasting System, Inc.,¹⁴ controlled by William S. Paley and associates. The third nation-wide system is the Mutual Broadcasting System, Inc.,¹⁵ which was established in 1934 and which is largely controlled by the Chicago Tribune and R. H. Macy & Co.

The broadcast business handled by the three national network organizations (excluding the nonnetwork business of the stations owned by them) constitutes almost half of the total business of all commercial broadcast stations in the United States. In 1938¹⁶ the network net time sales¹⁷ of NBC, CBS, and Mutual totaled over \$46,000,000, as com-

¹¹ Similarly, the appearance of network broadcasting in the frequency modulation (FM) field will merit careful study by the Commission. Early in April 1941 a proposed FM chain, The American Network, Inc., was organized at a meeting of some 45 broadcast groups. The board included John Shepard III, of the Yankee Network, Boston, chairman; Walter J. Damm, WTMJ; Herbert L. Petty, WJIN; Gordon Gray, WSJS; Harry Stone, WSM; and Jack Latham, manager, a former advertising and cigar company executive. See *FM Bulletin*, April 9, 1941, pp. 1-2.

¹² Hereinafter referred to as NBC.

¹³ Hereinafter referred to as RCA.

¹⁴ Hereinafter referred to as CBS.

¹⁵ Hereinafter referred to as Mutual.

¹⁶ The most recent financial and other data put in evidence at the committee hearings was, for most part, for the year 1938.

¹⁷ The term "network net time sales" means the amount received by the networks from the sale of time for network programs. The word "net" is used to indicate that discounts and agency commissions have been deducted.

pared with the net time sales of the entire industry in that year, amounting to about \$101,000,000.

Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements which have taken place in engineering, in program quality, and in the broadcasting of special events of national interest to ever increasing audiences have been due, in considerable measure, to the advertising revenues brought to the radio broadcasting industry by the network method of broadcasting to Nation-wide audiences.

If radio broadcasting is to serve its full function in disseminating information, opinion, and entertainment, it must bring to the people of the nation a diversified program service. There must be, on the one hand, programs of local self-expression, whereby matters of local interest and benefit are brought to the communities served by broadcast stations. There must be, on the other hand, access to events of national and regional interest and to programs of a type which cannot be originated by local communities. Neither type of program service should be subordinated to the other.

The growth and development of chain broadcasting found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs.

From an economic standpoint, the stations themselves are in a position to benefit greatly from their participation in chain broadcasting; such broadcasting can bring them a larger share of the money expended by advertisers for national or regional coverage. It is apparent that chain broadcasting plays an essential part in the development of the broadcast industry.

But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.

I. EARLY HISTORY OF NETWORK BROADCASTING (1923-26)

Network broadcasting is almost as old as broadcasting itself. The first network broadcast occurred in January 1923,¹ less than 3 years after the establishment of the first broadcasting stations.²

When broadcasting began, the stations were faced with the problem of deriving sufficient revenue from operations. There was considerable difference of opinion in the industry as to how this problem could be solved. Some believed that the manufacturers and distributors of radio receiving sets and parts should contribute to the cost of operating broadcasting stations as a service to the purchasers of sets and in order to stimulate sales. Others were of the opinion that broadcasting stations should be operated by the Government, or supported by endowment funds contributed by public-spirited citizens.³ The genesis of the sponsored program occurred on August 28, 1922, when the first sale of radio station time for commercial purposes was made by the American Telephone & Telegraph Co.'s station WEAf at New York City.⁴ The eventual success of the practice of selling radio time to advertisers, and the development of network broadcasting, are the foundation stones of the commercial structure of radio broadcasting today.

A. THE A. T. & T. NETWORK

Station WEAf was constructed in New York by the American Telephone & Telegraph Co. and was licensed on June 1, 1922. It was operated as a "toll" station, available for hire by those wishing to reach the public by radiotelephony.

At that time the Telephone Co. claimed the exclusive right, under certain patents and patent-licensing agreements, to sell radio time and operate "toll" stations.⁵ This right was asserted under a cross-licensing agreement dated July 1, 1920, between the General Electric Co. and the Telephone Co. and an extension agreement of the same date under which RCA and Western Electric were added as parties. The Westinghouse Electric & Manufacturing Co. was brought within the purview of these agreements on June 30, 1921.⁶ They gave the

¹ On January 4, 1923, a special circuit was set up between stations WEAf, New York City, and WNAC, Boston. A program originating at WEAf was then broadcast simultaneously by the two stations. See testimony of O. B. Hanson, NBC vice president and chief engineer, Transcript, p. 694; "Network Broadcasting," by Barrett and others, in *Bell Telephone Quarterly*, vol. 13, pp. 81-82 (April 1934).

² The first broadcast stations licensed for regular operation were WWJ at Detroit on October 13, 1921, and KDKA at Pittsburgh on November 7, 1921. On November 2, 1920, however, station KDKA broadcast, under a special license, the returns of the Harding-Cox election. See statement of M. H. Aylesworth in *Hearings on Confirmation of Federal Radio Commissioners*, before Senate Committee on Interstate Commerce, 70th Cong., 1st sess., February 4, 1928, p. 233.

³ See *New York Times*, May 18, 1924, sec. VIII, p. 3, for collection of opinions.

⁴ Hanson, Tr., p. 682.

⁵ Hanson, Tr., 688; *Radio Broadcast*, June 1924, pp. 130-132.

⁶ *Report of Federal Communications Commission on Investigation of the Telephone Industry in the United States*, 76th Cong., 1st sess., H. Doc. No. 340 (1939) (hereinafter cited as *F. C. C. Telephone Report*), pp. 225-226; *Report of Federal Trade Commission on the Radio Industry*, 67th Cong., 4th sess. (1923) (hereinafter cited as *F. T. C. Radio Report*), pp. 47-48.

Telephone Co. and its manufacturing subsidiary, the Western Electric Co., the sole rights to make, lease, and sell commercial radiotelephone transmitting equipment. This provision, the Telephone Co. insisted, gave it the exclusive right to sell time over a "toll" station. The assertion of these rights was a substantial factor in giving it a position of leadership during the early days of broadcasting.⁷

The Telephone Co. inaugurated network broadcasting on January 4, 1923, with a program broadcast simultaneous over station WEAF and a Boston station, WNAC, owned by John Shepard III.⁸ The second network broadcast occurred on June 7, 1923, and involved, in addition to WEAF, stations WGY in Schenectady, KDKA in Pittsburgh, and KYW in Chicago.⁹ The first continuous network broadcasting occurred during the summer of 1923, when for a period of 3 months station WEAF in New York programmed Col. Edward H. R. Green's station WMAF at South Dartmouth, Mass.¹⁰ During the summer of 1923 the Telephone Co., through one of its subsidiary companies, constructed station WCAP in Washington, and thereafter WEAF and WCAP were frequently connected for network broadcasting.¹¹ These two stations became the nucleus of the network built up by the Telephone Co.

From 1924 to 1926, the Telephone Co.'s network expanded its operations rapidly. Early in 1924, the company produced the first transcontinental network broadcast, utilizing station KPO in San Francisco.¹² By the fall of 1924, the Telephone Co. was able to furnish a coast-to-coast network of 23 stations to broadcast a speech by President Coolidge.¹³ At the end of 1925 there was a total of 26 stations on the regular Telephone Co. network, extending as far west as Kansas City (station KSD).¹⁴ The company was selling time to advertisers over a basic network of 13 stations at \$2,600 per hour,¹⁵ and was deriving gross revenues at the rate of about \$750,000 per year from the sale of time.¹⁶

B. THE RCA NETWORK

Meanwhile, RCA was making a start in network broadcasting. In the spring of 1923, RCA acquired sole control of station WJZ in New York City,¹⁷ and later that year it constructed and started to operate station WRC at Washington. The first network broadcast by RCA occurred in December 1923, and involved only WJZ and the General Electric Co.'s station WGY at Schenectady, N. Y. The connection was made with Western Union telegraph wires.¹⁸

⁷ The standard contract whereby the Telephone Co. sold transmitting equipment expressly provided that the purchaser was not to use the station for profit. *Radio Broadcast*, June 1924, pp. 130-132. It should be noted, however, that some independent stations operated in spite of the Telephone Co.'s claims. *Radio Broadcast*, June 1924, pp. 130-132. After April 18, 1924, some independent stations were licensed by the Telephone Co. to engage in "toll" broadcasting. Hanson, Tr. pp. 678 et seq.; F. C. C. Telephone Report, pp. 387-399.

⁸ *Supra*, n. 1.

⁹ Hanson, Tr. p. 698. Station WGY was owned by General Electric Co. and stations KDKA and KYW by the Westinghouse Electric & Manufacturing Co.

¹⁰ *Id.*, p. 699.

¹¹ F. C. C. Telephone Report, p. 388. WCAP discontinued operations in 1926. *Infra*, n. 24.

¹² Hanson, Tr. p. 711.

¹³ *New York Times*, October 24, 1924, p. 1.

¹⁴ Hanson, Tr. p. 717.

¹⁵ Archer, *History of Radio to 1926*, p. 361.

¹⁶ Archer, *Bio Business in Radio*, p. 248.

¹⁷ Station WJZ had originally been jointly controlled by Westinghouse and RCA. *RCA Annual Report for 1922*, p. 20. Its studios were originally located in Newark, but were moved to New York in 1922.

¹⁸ Hanson, Tr. p. 704.

Although there was keen rivalry between stations WEAF and WJZ during this period, the vigorous network competition which RCA might otherwise have offered was hampered because of two factors. In the first place, RCA was prevented from reaching numerous outlets and developing its network because of the Telephone Co.'s policy with respect to the use of its telephone lines by others for network purposes.¹⁹ The telegraph wires which RCA was thus compelled to use were quite inferior for this purpose. Secondly, RCA was prevented from developing the business aspects of broadcasting and network broadcasting by its inability to sell time to advertisers; for the Telephone Co. claimed, under the cross-licensing agreement of July 1, 1920, the exclusive right to sell time for broadcasting purposes.²⁰ Hence RCA stations made no charge for the use of time.²¹

Largely because of these obstacles, the RCA network did not grow as rapidly as the Telephone Co.'s network. Thus, while the Telephone Co. was able, in March 1925, to broadcast President Coolidge's inauguration over a transcontinental network of 22 stations, the RCA network carried it only over WJZ, WBZ, WGY, and WRC.²²

C. SALE OF WEAF AND THE TELEPHONE COMPANY NETWORK TO RCA

In 1926, the Telephone Co.'s direct participation in the broadcasting business, in which it had pioneered and attained a dominant position, came to an abrupt end. As part of a general readjustment of relations between the Telephone Co. and the so-called "Radio Group" (RCA, Westinghouse, and General Electric), the Telephone Co. withdrew from the broadcasting field and transferred its properties and interests to the "Radio Group."

In May, 1926, the Telephone Co. had incorporated a subsidiary corporation, the Broadcasting Co. of America, to which were transferred WEAF and the network operations. On July 1, 1926, a contract was entered into, which became effective November 1, 1926, under which RCA purchased the assets of the Broadcasting Co. of America.²³ The purchase price was \$1,000,000, and the transaction included WEAF and the entire broadcasting business of the Telephone Co. except the Washington station, WCAP, which was closed.²⁴ As a result of this sale, the way was cleared for the sale of broadcasting time by the "Radio Group." The Telephone Co. also agreed to withdraw from the broadcasting business and covenanted not to compete with RCA in this field for a period of 7 years, under penalty of repaying \$800,000 of the \$1,000,000 purchase price. The Telephone

¹⁹ F. C. C. *Telephone Report*, pp. 389-392; Hanson, *Tr.*, p. 687. The policy which the Telephone Co. in general, this policy was to decline to furnish this service to broadcast stations for network broadcasting and to pick up programs originating outside station studios was designed to protect the broadcasting activities and the patent position of the Telephone Co. In general, this policy was to decline to furnish this service to broadcasting stations which were not licensed under the Telephone Co.'s patents and to limit in various ways wire service supplied to licensed stations. For a discussion of the broadcasting activities of the Telephone Co., see F. C. C. *Telephone Report*, pp. 387-399.

²⁰ *Supra*, p. 5.

²¹ *Arthur*, *op. cit. supra*, n. 15, p. 304.

²² *New York Times*, March 5, 1925, p. 5.

²³ F. C. C. *Telephone Report*, pp. 392-395; *Report on Communication Companies*, 73d Cong., 2d sess., H. Rept. 1273 (1934) (hereinafter cited as *Report on Communication Companies*), pt. 3, p. 4074.

²⁴ WCAP, the Telephone Co.'s station in Washington, had been sharing time with WRC, the RCA station in Washington. Following consummation of the agreement, WCAP discontinued operation and WRC took over its operating time and programs. *New York Times*, July 28, 1926, p. 33.

Co. also agreed to make available its telephone lines to RCA for network purposes, and an understanding was reached that RCA would use only Telephone Co. lines, unless they were not available.²⁵

D. FORMATION OF THE NATIONAL BROADCASTING COMPANY

On September 9, 1926, RCA formed a corporation, the National Broadcasting Co., to take over its network broadcasting business, including the properties being purchased from the Telephone Co.²⁶ In October 1926, RCA assigned to NBC its rights to purchase the Broadcasting Co. of America, and in November NBC paid the purchase price of \$1,000,000, and took over the operation of WEAF and the old Telephone Co. network.²⁷

The outstanding capital stock of NBC was owned by RCA, General Electric, and Westinghouse in the ratio of 50, 30, and 20 percent, respectively, from the date of incorporation to May 23, 1930. On that date RCA acquired the NBC stock previously owned by General Electric and Westinghouse.²⁸ Thus NBC became a wholly owned subsidiary of RCA.

The sale of station WEAF to NBC and the withdrawal of the Telephone Co. from the broadcasting business marked the end of an era. The pioneer stage of network broadcasting was drawing to a close. The Telephone Co. had been well on its way toward financial success in the operation of WEAF as a "toll" station. The technical and social practicability of network broadcasting had been clearly shown as early as March 4, 1925, when the Telephone Co.'s 22-station network carried the inaugural address of President Coolidge to an audience estimated at 18,000,000 listeners.²⁹

RCA could not fail to assume a dominant position in the field of network broadcasting as a result of its purchase of WEAF and the Telephone Co. network. Following the purchase, the only two networks in the country were under the control of RCA. The purchase has had a lasting effect on the structure of network broadcasting; for NBC's present operation of two networks—the "Red" and the "Blue"—stems from its ownership of both WEAF and WJZ in New York City, and from its acquisition of the Telephone Co.'s network organization in addition to RCA's original network system based on WJZ. For some time after the purchase, RCA had a practical monopoly of network broadcasting, and NBC is still by far the largest network organization.

²⁵ F. C. C. Telephone Report, p. 394; Hanson, Tr., p. 855.

²⁶ Report on Communication Companies, pt. 3, p. 4048.

²⁷ F. C. C. Telephone Report, p. 393.

²⁸ Report on Communication Companies, pt. 3, p. 4080.

²⁹ New York Times, March 5, 1925, p. 5. It was also estimated that about 4,800,000 persons heard the broadcast over the RCA network of four stations, WJZ, WBZ, WRC, and WGY.

H. THE RADIO CORPORATION OF AMERICA AND THE NATIONAL BROADCASTING COMPANY

In examining the history and structure of the largest national network organization—NBC—it is essential to bear in mind that it is a wholly owned subsidiary of the Radio Corporation of America. NBC is but a branch—though an important branch—of a vast corporate enterprise which straddles the fields of communications, radio-equipment manufacturing, and entertainment. The position of NBC in the field of broadcasting cannot be fully understood nor properly evaluated without some grasp of the history and activities of RCA.

A. HISTORY AND ACTIVITIES OF RCA

The Radio Corporation of America was incorporated in Delaware on October 17, 1919,¹ a full year before the dawn of radio broadcasting. At that time the business of wireless was primarily point-to-point and ship-to-shore communication for the transmission of messages, and the determination of location and direction by means of the radio compass. Substantially all commercial wireless communication in the United States was then carried on by the Marconi Wireless Telegraph Co. of America (American Marconi Co.) which was controlled by Marconi's Wireless Telegraph Co., Ltd. (British Marconi Co.).² A number of American-controlled companies, however, were carrying on research in the radio field, manufacturing radio apparatus, and holding important radio patents. Among these were the General Electric Co., the Westinghouse Electric and Manufacturing Co., and the Western Electric Co., the manufacturing subsidiary of the American Telephone & Telegraph Co.³

The patent situation had become an obstacle to the development of radio; for each manufacturer needed patented devices controlled by others. Since there was no general cross-licensing of patents among the manufacturers, each company was vulnerable to patent infringement suits. The taking over of all wireless stations by the Government after the declaration of war in April 1917 radically altered the patent situation. Under its war-time control the Government was able to combine the patents and scientific resources of all electrical manufacturers. Thus manufacturers producing apparatus for the Government could use the patents and inventions of others indiscriminately without remuneration to the owners of patents, whose only redress was the filing of claims for damages against the United States in the Court of Claims. As a result of combining various patented inventions, new devices were developed out of which came practical radiotelephone transmitters satisfactory for war-time

¹ *Report on Communication Companies*, pt. 3, p. 4114.

² *Id.*, pp. 890-891; *F. T. C. Radio Report*, p. 12.

³ *F. T. C. Radio Report*, pp. 2, 13-18.

purposes.⁴ This intermingling of patents worked well as long as the industry was on a war-time basis under Government control, and while claims for patent infringement were being subordinated to the urgent necessity of developing and maintaining an efficient communications system. But it was anticipated that much confusion in the patent field would result upon the return of the wireless stations to their owners.⁵

The creation of RCA was related both to the patent tangle, and to a desire that American radio-communications should not be under foreign control. In the spring of 1919, the General Electric Co. had been negotiating for the sale to the British Marconi interests of exclusive rights in the Alexanderson alternator, a patented device which at that time was considered of critical importance in long-distance radio transmission. Rear Admiral W. H. G. Bullard, then Director of Naval Communications, opposed the transfer of this device to foreign control. Instead of selling these rights, General Electric evolved a comprehensive plan under which the British stock interest in the American Marconi Co. would be purchased, and a new corporation formed which would take over the business of the American Marconi Co., and use and license others to use the patents held by General Electric, the American Marconi Co., and other companies. In pursuance of this plan, RCA was formed; in November 1919 it absorbed the American Marconi Co. and entered into a cross-licensing agreement with the General Electric Co., which acquired a large block of RCA stock.⁶ When Federal operation of radio stations terminated, RCA embarked upon the activities which were to make it the leading American radio-communications company.

In 1920 and 1921 additional cross-licensing agreements were concluded which involved, in addition to General Electric and RCA, the Telephone Co. (including its manufacturing subsidiary, the Western Electric Co.) and Westinghouse.⁷ As a result of these agreements (1) General Electric and Westinghouse obtained the exclusive right to manufacture radio receiving sets; (2) RCA obtained the exclusive right to sell radio receiving sets, which were to be purchased by RCA from General Electric and Westinghouse in the proportion of 60 and 40 percent; (3) the Telephone Co. was granted the exclusive right to make, lease, and sell broadcasting transmitters.⁸

⁴ As early as 1915, the Government, in conjunction with the Telephone Co., had carried on experiments in the field of radiotelephony. During that year, messages were sent from the naval station at Arlington, Va., and from Washington to such distant points as San Francisco, Honolulu, and Paris. In 1916, radiotelephony was used in transmitting messages to a naval destroyer 550 miles at sea, to airplanes in flight, and to submarine chasers. A climactic event in the history of radiotelephony occurred in 1919 when the Secretary of the Navy in Washington conversed by this method with the President of the United States, 1,000 miles at sea. "Rise of the Wireless Telephone," *Current History*, May 1920, pp. 265-269; "Wireless Telegraphy," by N. H. Slaughter, *Annual Report of Smithsonian Institution*, 1919, pp. 180-182; "Radio Telegraphy," by E. H. Colpitts, in *Journal of the Society of Automotive Engineers*, September 1919, pp. 215, 216; Report of Director of Naval Communications in Report of the Secretary of the Navy, Miscellaneous Reports (1916), pp. 146-147; see also *New York Times*, October 23, 1914, p. 9; January 27, 1915, p. 1; September 30, 1915, p. 1; October 4, 1915, pp. 1, 3; November 6, 1915, p. 4; May 7, 1916, sec. 1, p. 6; May 8, 1916, p. 41.

⁵ *Ibid.*, see also Archer, *History of Radio to 1936*, pp. 137-141, 158.

⁶ F. T. C. *Radio Report*, pp. 17-22, 39-43; statement of O. F. Schuette in *Hearings on H. R. 8825*, 70th Cong., 1st sess., before House Committee on Merchant Marine and Fisheries (1928), pp. 277-278.

⁷ *Supra*, pp. 5-6; F. T. C. *Radio Report*, pp. 44-49.

⁸ These agreements were revised in 1926. It should be noted, however, that although these agreements purported to confer exclusive rights, they were binding only on the parties. With respect to persons not parties to the agreements, the exclusive nature of the rights exchanged depended upon the validity and scope of the patents upon which they were based. And, in fact, some manufacturers made and sold broadcast transmitters and receivers without regard to those patents.

In connection with all these agreements, General Electric, Westinghouse, and the Telephone Co. obtained substantial stock interests in RCA.⁹ The Telephone Co. had disposed of its RCA stock by January 18, 1923, but Westinghouse and the General Electric Co. did not divest themselves of their interest in R. C. A. until after 1932, when a consent decree was entered as a result of an antitrust action brought by the Department of Justice.¹⁰

1. Communications activities of RCA

As may be seen from the foregoing account, RCA was formed before the days of broadcasting, primarily for the purpose of carrying on communications activities. Its operations during the first 2 years of its existence may be summarized as follows: Supplying radio apparatus to ships; maintaining radio communication between ships and from ship to shore; furnishing transoceanic point-to-point radio communication service; and selling the parts used by amateurs and experimenters in assembling radio sets.¹¹

During 1921, RCA's gross income from its transoceanic communications activity amounted to \$2,138,626.¹² The volume of this business thereafter increased, but rather conservatively. In 1929 RCA formed a subsidiary corporation—R. C. A. Communications, Inc.—to carry on its international and domestic point-to-point radio communications business. From 1929 to 1932 the revenues of this subsidiary averaged about \$4,250,000 per year.¹³

At the end of 1927, RCA's marine radio business was also turned over to a new wholly owned subsidiary, the Radiomarine Corporation of America. Radiomarine took over ship-to-shore and ship-to-ship communication, the installation of radio apparatus on shipboard, and the operation of coastal stations that communicate with ships.¹⁴

2. RCA's radio manufacturing and selling activities

As set forth above, under the 1920 cross-licensing agreements RCA became the sole sales agent for radio receiving sets manufactured by General Electric and Westinghouse.¹⁵ The development

⁹ The following table, based upon data in the F. T. C. *Radio Report*, p. 20, indicates the distribution of RCA stock outstanding in 1922:

Name of stockholder	Common stock	Preferred stock	Percent of total voting stock ¹
General Electric	1,876,000	620,800	25.8
Westinghouse	1,000,000	1,000,000	20.6
American Telephone & Telegraph Co.		400,000	4.1
United Fruit Co.	160,000	200,000	3.7
Others ²	2,698,194	1,735,174	45.8
Total ³	5,734,194	3,955,974	100.0

¹ Both common and preferred shares had equal voting power, share for share. *Moody's Manual of Railroads and Corporation Securities—Public Utilities* (1920), p. 2246.

² Most of these were former stockholders of the Marconi Co. of America. *Report on Communication Companies*, pt. 3, p. 1003.

³ *Report on Communication Companies*, pt. 3, pp. 1003-1004. For terms of consent decree, see *Hearings on H. R. 4723, Before House Committee on Patents*, 74th Cong., 1st sess. (1935), pp. 220-223.

⁴ F. T. C. *Radio Report*, p. 33.

⁵ *Id.*, p. 87.

⁶ *Report on Communication Companies*, pt. 3, pp. 4186, 4194.

⁷ *Id.*, pt. 1, p. 115, and pt. 3, p. 4173.

⁸ *Supra*, p. 10.

of broadcasting caused the demand for these sets to grow by leaps and bounds. During 1921, RCA's gross sales were only \$1,468,929, or about two-thirds as much as its total revenues from transoceanic communication. The next year the gross sales had increased to \$11,286,489, or nearly four times that year's total revenues from transoceanic communication.¹⁶ By 1924, gross sales totaled about \$50,000,000.¹⁷ In September 1926, RCA announced that it was the largest distributor of radio receiving sets in the world.¹⁸ Thereafter RCA granted licenses to a number of radio set manufacturers,¹⁹ but continued as one of the outstanding sellers of receiving sets.

In 1930 RCA spread into the manufacturing of receiving sets. In that year RCA acquired the right to manufacture as well as sell radio receivers, by virtue of an agreement between RCA, General Electric, and Westinghouse.²⁰ It occupies a leading position in that field today.

In connection with the sale of station WEAf and the Telephone Co. network to RCA in 1926, a new cross-licensing agreement was executed whereby the Telephone Co. granted to the Radio Group the nonexclusive right to manufacture, lease, and sell broadcast transmitting equipment, thus relinquishing its claim to the exclusive right with respect to such equipment which it had asserted under the 1920 agreement.²¹ Within the Radio Group, RCA's early role with respect to broadcast transmitting equipment was that of sales agent. Under the new agreements entered into pursuant to the 1932 consent decree, RCA acquired the right to manufacture as well as sell such apparatus.²² Since that time RCA has been a leading manufacturer in this field.

RCA is also prominent in other phases of radio manufacturing and selling. Until the expiration of an important patent in November 1922, RCA controlled the manufacture, sale, and use of all forms of radio tubes, and it has retained a substantial portion of the business since that time.²³

For about the first decade of its corporate existence RCA carried on substantially all its manufacturing and selling activities under its own name. On December 26, 1929, RCA Radiotron Co., Inc. was incorporated by RCA to engage in the manufacture and sale of radio tubes.²⁴

At the same time RCA Victor Co., Inc. was incorporated by RCA to take over the assets and business of the Victor Talking Machine Co. with respect to phonographs and records, and the manufacturing and sales rights of RCA with respect to radio apparatus.²⁵ On

¹⁶ F. T. C. Radio Report, p. 37.

¹⁷ RCA Annual Report for 1925, p. 14.

¹⁸ See the statement of David Sarnoff, chairman of the board of directors of NRC and president of RCA, Tr., p. 29.

¹⁹ Radio Broadcast, June 1929, p. 78.

²⁰ Moody's Manual of Investments—Industrials (1931), p. 2277.

²¹ F. C. C. Telephone Report, p. 399.

²² Report on Communication Companies, pt. 1, pp. 118, 224.

²³ F. T. C. Radio Report, p. 76. Even after the expiration of this patent, RCA was able to retain at least half of the total radio tube business for almost 10 years. Radio Broadcast, April 1929, p. 379. One of the methods through which RCA was able to maintain its position was a standard clause in its contracts with radio set manufacturers licensed under RCA patents, the effect of which was to require RCA licensees to use RCA tubes in their receivers. This clause was held to be in violation of sec. 3 of the Clayton Act (*Lord v. Radio Corporation of America*, 24 F. (2d) 565 (D. Del. 1928), *aff'd* 28 F. (2d) 257 (C. C. A. 3, 1928), *cert. den.*, 278 U. S. 648 (1928); 35 F. (2d) 962 (D. Del., 1929), *aff'd* 47 F. (2d) 606 (C. C. A. 3, 1931), *cert. den.*, 283 U. S. 847 (1931), and the percentage of the radio tube business controlled by RCA has since declined.

²⁴ Report on Communication Companies, pt. 1, p. 115.

²⁵ *Ibid.*, and *infra*, p. 14.

January 1, 1932, RCA transferred its investment in RCA Photophone, Inc., to RCA Victor Co., Inc.²⁶ In January 1935 RCA Radiotron Co., Inc., and RCA Victor Co., Inc. were merged into a new company called RCA Manufacturing Co., Inc.,²⁷ which has become the manufacturing subsidiary of the RCA system. In addition to radio receiving sets, transmitters, and tubes, phonographs and records, RCA Manufacturing Co. now makes transcriptions, sound equipment for both motion-picture studios and theaters, and public-address systems, as well as motion picture and radio equipment for amateurs, electron microscopes, electronic pianos, television transmitters and receivers, radio compasses, communications equipment, and a variety of other products.

B. RCA's interest in the motion-picture industry

In the fall of 1927, RCA acquired a foothold in the motion-picture industry by the purchase of blocks of stock in Film Booking Office (FBO), which operated studios for the production of motion pictures.²⁸ In April 1928 RCA Photophone, Inc., was organized by the Radio Group to develop apparatus for synchronizing motion pictures with sound,²⁹ and it entered into competition with Electrical Research Products, Inc., a subsidiary of Western Electric, which had already occupied a large segment of this field.³⁰

On October 25, 1928, Radio-Keith-Orpheum Corporation (RKO) was formed by a merger of FBO and Keith-Albee-Orpheum Corporation (KAO), a company operating vaudeville and motion-picture theaters, and stock in RKO was issued in exchange for outstanding shares of KAO and FBO.³¹ There were two classes of RKO stock, having equal voting rights: Class A with 3,500,000 shares authorized and 1,212,992 issued, and class B with 500,000 shares authorized and issued. All of the class B stock was issued to RCA. RCA Photophone, Inc., then granted to RKO and its subsidiaries engaged in the production of motion pictures a non-exclusive license for the use of its sound-recording equipment.³²

RKO also obtained direct and indirect interests in approximately 150 companies engaged primarily in operating theaters in cities through the United States and Canada and in producing motion pictures and distributing them throughout the world.³³ The theaters in which RKO had an interest also furnished a market for the sound-reproducing equipment manufactured by RCA Photophone, Inc.³⁴

In 1930 RCA held approximately 25 percent, and in 1932 approximately 64 percent, of the outstanding stock of RKO.³⁵ In 1935 RCA sold one-half of its holdings in RKO to the Atlas Corporation for \$5,000,000 cash and gave an option on the remainder at \$6,000,000, which was to remain in effect until December 31, 1937.³⁶ In 1936 this

²⁶ *Id.*, pt. 3, p. 4233.

²⁷ *RCA Annual Report for 1934*, p. 6.

²⁸ *Poor's Industrials* (1929), p. 2902; *New York Times*, January 5, 1928, p. 33.

²⁹ *Moody's Manual of Investments—Industrials* (1930), p. 582; RCA Photophone, Inc., was originally owned by RCA, General Electric, and Westinghouse in the ratios of 60, 24, and 16 percent, respectively. In 1930, however, RCA acquired the entire stock interest in RCA Photophone, Inc. Archer, *Big Business and Radio*, p. 331.

³⁰ F. C. C. Telephone Report, pp. 401-415.

³¹ *RCA Annual Report for 1928*, p. 7; *Poor's Industrials* (1929), p. 2906.

³² *Poor's Industrials* (1929), pp. 2906-2907.

³³ *Report on Communication Companies*, pt. 1, p. 116, and pt. 3, p. 4142.

³⁴ *Moody's Manual of Investments—Industrials* (1931), p. 2278.

³⁵ *RCA Annual Report for 1930*, p. 23; for 1932, p. 4; *Poor's Industrials* (1931), pp. 2849-

2851.

³⁶ *RCA Annual Report for 1935*, p. 2.

option was extended to June 30, 1938, because of the reorganization of RKO.³⁷ In 1939 the president of RCA testified that the option had not been exercised and had lapsed, and that at that time RCA held between 12 and 15 percent of the stock of RKO.³⁸

4. RCA's phonograph and recording business

The interrelation of the phonograph and the radio was early recognized by RCA. In 1924 RCA entered into a contract with Brunswick-Balke-Collender Co. for the sale of radio apparatus for use in connection with combination radio-phonograph instruments,³⁹ and the following year a similar contract was made by RCA with Victor Talking Machine Co.⁴⁰ Both contracts provided that the recording artists of the phonograph companies were to broadcast over the facilities of the RCA stations.

On March 15, 1929, RCA acquired a majority, and within about 2 months 96 percent, of the capital stock of Victor Talking Machine Co. In 1928 Victor's assets had been \$68,312,482; its gross sales, \$52,064,419; and its net income \$7,324,019.⁴¹ RCA Victor Co., Inc., was incorporated by RCA on December 26, 1929, and took over the assets and the manufacturing and sales activities of the Victor Talking Machine Co., as well as the manufacturing and sales rights of RCA with respect to radio apparatus.⁴²

As part of the transaction whereby RCA acquired stock in Victor Talking Machine Co., it also acquired the 50-percent stock interest in Gramophone Co., Ltd., of Great Britain, previously held by Victor. Gramophone Co., Ltd., had exclusive rights to manufacture and distribute Victor products in Great Britain and other foreign markets.⁴³ During 1931 Gramophone Co., Ltd., merged with Columbia Graphophone Co., Ltd., to form Electric & Musical Industries, Ltd.⁴⁴ RCA's interest in this newly formed company was 29.2 percent of the "ordinary" stock and 0.02 percent of the preferred stock.⁴⁵ In 1935 RCA sold its holdings in Electric & Musical Industries, Ltd., to British interests for \$10,225,917.⁴⁶

B. THE NATIONAL BROADCASTING CO.

The early history of RCA's broadcasting activities has been set forth in the preceding chapter. These activities were, after 1926, concentrated by RCA in its subsidiary, NBC, which took over WEAf and the

³⁷ RCA Annual Report for 1937, p. 6.

³⁸ Sarnoff, Tr., pp. 8495-8496.

³⁹ RCA Annual Report for 1923, p. 9. The consummation of this contract was announced by David Sarnoff on behalf of RCA as follows:

"Under the contract recently concluded, the phonograph company gains the right to install Radiola receiving sets in combination with Brunswick phonographs. In turn, the phonograph company will add its share to the public service now rendered by the principal broadcasting stations and aid the development of free broadcasting to the public by permitting the stations of the Radio Corporation of America and those of its manufacturing associates to broadcast from the laboratories of the Brunswick Co. when its artists are recording for phonograph reproduction and to encourage these artists to aid the programs at other times as well." *New York Times*, March 13, 1924, p. 15.

⁴⁰ RCA Annual Report for 1925, pp. 7-8. The contract with the Victor Talking Machine Co., signed May 16, 1925, provided that RCA would manufacture receiving sets to be put into Victrolas and that Victor artists would broadcast over the facilities of station WJZ. *New York Times*, May 21, 1925, p. 16.

⁴¹ Report on Communication Companies, pt. 3, pp. 4242-4244.

⁴² Id., pp. 4229-4230.

⁴³ Moody's Manual of Investments—Industrials (1929), pp. 790-791; *Poor's Industrials* (1929), pp. 2902-2903.

⁴⁴ RCA Annual Report for 1931, p. 4.

⁴⁵ RCA Annual Report for 1933, p. 12.

⁴⁶ RCA Annual Report for 1935, p. 2.

old Telephone Co. network. Thereafter, NBC, pursuant to its understanding with the Telephone Co., discontinued the use of telegraph lines and used Telephone Co. long lines exclusively for connections between stations.⁴⁷ On the business side, NBC continued to sell time to advertisers, a policy which had been inaugurated by the Telephone Co. at station WEAF, and since that time about 90 percent of its total revenues has come from that source.

1. Increase in number of NBC outlets

On November 1, 1926, there were 19 stations regularly on the NBC network. The number has steadily increased since that time. By January 1, 1928, there were 48 outlets. On December 23, 1928, the first permanent transcontinental network was instituted by NBC, composed of 56 permanent network stations. There were 154 outlet stations as of September 1, 1938, and as of December 31, 1940, the number had increased to 214. The following chart shows the increase in the number of NBC outlets:⁴⁸

[Figures prior to Nov. 1, 1926, are for the Telephone Co. network]

Date (end of year)	Number of NBC outlets	Approximate percentage of NBC outlets to total number of licensed stations	Date (end of year)	Number of NBC outlets	Approximate percentage of NBC outlets to total number of licensed stations
1923	2	0.3	1933	85	14.6
1924	7	1.3	1934	86	14.7
1925	15	2.6	1935	87	14.1
1926 ¹	19	2.6	1936	103	15.9
1927	48	6.9	1937	138	20.0
1928	56	8.3	1938 ²	161	22.3
1929	60	11.2	1940 ³	178	23.3
1930	72	11.9	1940	214	25.8
1931	83	13.8	1941 ³	221	26.4
1932	85	14.2			

¹ Nov. 1.

² Nov. 30.

³ Feb. 1.

Since the time of its organization, NBC has operated two networks, the Red and the Blue. In many cases they use the same facilities and stations. As of September 1, 1938, when there were 154 NBC outlets, 23 composed the basic Red network and 24 composed the basic Blue network. Supplementing these basic networks were 107 stations, of which one was available only to the basic Red network, six were available only to the basic Blue network, and the remainder available to either.

2. Stations owned or controlled by NBC

NBC acquired station WEAF by purchase from the Telephone Co. in 1926, and WEAF became the key station of NBC's Red network. Prior to 1926, RCA had constructed and was operating station WJZ in New York and WRC in Washington. NBC's other network, the Blue, was based on WJZ, although title to WJZ and WRC was not

⁴⁷ See *supra*, p. 8, n. 25.

⁴⁸ This table, as well as the corresponding tables on CBS and Mutual, is based upon the record and upon reports to the Commission filed since the committee hearings. All three tables include stations not only in continental United States but also stations in the possessions and Territories.

formally transferred from RCA to NBC until 1930. Since 1926 NBC has purchased or leased, and has become the licensee of, 7 other stations located in important radio markets. The 10 stations of which NBC is now the licensee, all but one of which (WENR) operate with unlimited time, are shown in the following table:

Station	Location	Power	Date of acquisition
WEAF	New York	50,000	1926
WJZ	New York	50,000	1922
WRC	Washington	5,000	1923
WMAL	Washington	5,000	1933
WTAM	Cleveland	50,000	1930
WMAQ	Chicago	50,000	1931
WENR	Chicago	50,000	1930
KOA	Denver	50,000	1932
KPO	San Francisco	50,000	1930
KGO	San Francisco	7,500	1930

¹ Date of acquisition by RCA; title transferred to NBC in 1930.

At the time of the committee hearings five other stations were "programmed" by NBC under management contracts with the licensees. These stations were WGY, licensed to the General Electric Co. at Schenectady, N. Y., and four Westinghouse stations—KDKA at Pittsburgh, KYW at Philadelphia, WBZ at Boston, and WBZA at Springfield, Mass. All of these stations except WBZA⁴⁹ were licensed to operate with 50,000 watts.

The contracts under which NBC obtained the right to program these stations were made in November 1932, at the time of the consent decree⁵⁰ under which the General Electric Co. and Westinghouse agreed to dispose of their stock holdings in RCA. The contracts transferred to NBC control over the operations of the stations, insofar as the listening public was concerned, and raised serious questions under section 12 of the Radio Act of 1927 (sec. 310 (b) of the Communications Act of 1934), since the Commission's consent to a transfer of the licenses was not applied for nor obtained. Accordingly, in January 1940, the applications for renewal of the licenses of these stations were designated for hearing.⁵¹ Shortly thereafter the management contracts were rescinded, and the five stations entered into contracts of affiliation with NBC.⁵²

3. Increase in business and income of NBC

Except for the first 14 months of its existence, NBC has earned substantial profits every year. Both the volume of business and the profit have increased materially and with great regularity since that 14-month period. The following table, based upon exhibits at the

⁴⁹ Station WBZA, with a power of 1,000 watts, operates synchronously with WBZ.

⁵⁰ *Supra*, p. 11.

⁵¹ After these arrangements had been voluntarily abandoned, the renewals were granted for reasons set forth in the orders and decision of the Commission. *In re Applications of Westinghouse Electric and Manufacturing Company for Renewals of Licenses* (stations WBZ, WBZA, KYW, and KDKA), Docket Nos. 5823-5826, September 4, 1940; *In re General Electric Company (WGY), Application for Renewal of License and Auxiliary*, October 22, 1940, Docket No. 5822.

⁵² The effective date of these contracts for the four Westinghouse stations was July 1, 1940, and for the General Electric station, October 1, 1940.

committee hearings and the records of the Commission, presents a summary of the annual time sales and profit of NBC through 1940:

Year	Time sales (after dis- counts; before agency com- missions)	Net income for the year (before Fed- eral income tax)	Year	Time sales (after dis- counts; before agency com- missions)	Net income for the year (before Fed- eral income tax)
November 1926-De- cember 1927	\$3,384,519	\$264,385	1934	\$23,535,130	\$2,436,302
1928	7,256,179	427,239	1935	26,679,834	3,656,907
1929	11,353,120	798,160	1936	30,148,753	4,266,609
1930	15,701,331	2,167,471	1937	33,690,246	4,429,386
1931	20,455,210	2,663,220	1938	35,611,145	4,137,503
1932	20,915,979	1,163,310	1939	37,747,543	4,103,909
1933	18,005,369	594,151	1940	41,683,341	5,834,772

1 Deficit.

4. NBC artists' bureau and concert service

Within a few months after it commenced operations in 1926, NBC organized an artists' service as a department of the company for the purpose of managing concert artists, actors, announcers, writers, and other talent. In 1931 NBC acquired a 50-percent interest in Civic Concert Service, Inc., which was engaged in the business of organizing and managing concert courses throughout the country, and in 1935 NBC acquired the remaining 50 percent. In 1928 the business of the NBC artists' service amounted to slightly over \$1,000,000, while in 1937 the gross talent bookings came to \$6,032,274, which included the gross receipts of the Civic Concert Service Inc., amounting to \$306,099. On November 1, 1938, the NBC artists' service had more than 350 artists under management contract. Civic Concert Service, Inc., had membership concert courses in 57 cities when NBC acquired an interest in the company in 1931; by 1938 the list of cities served by Civic Concert had grown to 77.

As agent for artists, NBC is under a fiduciary duty to procure the best terms possible for the artists. As employer of artists, NBC is interested in securing the best terms possible from the artists. NBC's dual role necessarily prevents arm's-length bargaining and constitutes a serious conflict of interest. Moreover, this dual capacity gives NBC an unfair advantage over independent artists' representatives who do not themselves control employment opportunities or have direct access to the radio audience. Many of these independent artists' representatives have complained to the Commission of NBC's unfair control over the supply of talent and have filed briefs in this proceeding. This problem will receive the continuing attention of the Commission and may warrant further inquiry.

5. Transcription business of NBC

NBC entered the transcription business in 1934, but did not get under way commercially in this field until about a year later. It has since engaged in the three principal phases of that business. The first is a library service, called the Thesaurus, a collection of transcribed musical selections leased or licensed to individual stations. This enables the station to produce programs by merely adding its own announcements. The second is the so-called custom-built transcription service,

consisting of full programs produced by NBC or by sponsors or advertising agencies. Such transcriptions are delivered as a complete package at a unit price to radio stations and to commercial sponsors. The third is the "simultaneous wire line recording," or recording of a program while it is being broadcast, usually for the purpose of a later rebroadcast.

In its transcription business, NBC cooperates with RCA Manufacturing Co., its affiliate, also owned by RCA. NBC arranges the programming and sells the transcriptions, while RCA Manufacturing makes the recordings. It is estimated that the total transcription business carried on in the United States in 1938 amounted to something less than \$5,000,000, of which NBC-RCA accounted for \$1,300,000.

Prior to April 1, 1941, NBC refused to permit any transcription company other than its associate, RCA Manufacturing Co., to make a "simultaneous wire line recording" of an NBC network commercial program. Even when the sponsor who was paying the entire expense, the agency in charge of producing the program, and an independent transcription company had come to an agreement for the transcription of an NBC network program, NBC refused to permit the independent company to come upon the premises for the purpose of making the transcription in accordance with the agreement. Independent transcription companies appeared in this proceeding and complained of this unfair competition. However, in March 1941, following the committee report and the oral argument, NBC publicly announced a change in its policy; ⁵³ after April 1 the prohibition against the transcription of NBC network programs by independent companies would be removed and the advertiser allowed the transcription company of its choice.

C. SUMMARY OF RCA'S SCOPE OF OPERATIONS

RCA was originally founded to utilize wireless techniques for the transmission of messages; today it bestrides whole industries, dwarfing its competitors in each. Every new step has not only increased RCA's power in field already occupied, but has enhanced its competitive advantage in occupying fields more and more remote from its beginnings.

Thus, for example, RCA's control of thousands of patents, and its experience with and ownership of prebroadcasting wireless transmitters, as well as its support from General Electric and Westinghouse, gave it a running start in the infant radio-broadcasting industry. Later, RCA's position as the leading distributor of radio receivers enabled it to enter the business of selling radio-phonograph combinations in cooperation first with Brunswick and then with Victor, and subsequently to acquire Victor, the leading phonograph and phonograph record manufacturer. This step-by-step invasion of the phonograph business, in turn, gave RCA entering wedges into the transcription and talent supply businesses; RCA-Victor artists broadcast over NBC and made RCA transcriptions, while NBC artists recorded for RCA-Victor. The result was to give RCA and its subsidiaries a marked competitive advantage over other broadcasting companies, other radio manufacturers, and other phonograph and phonograph-record companies.

⁵³ Radio Daily, March 24, 1941, p. 1.

RCA's entry into the motion-picture field, first through RCA Photophone and then through RKO, was also a step-by-step process, and similarly buttressed RCA's competitive position in other spheres. Today, with its patents, managed artists, manufacturing plants, distribution facilities, personnel, experience, and financial strength, RCA has a tremendous competitive advantage in occupying such newly opening fields as frequency modulation (FM) broadcasting and television—an advantage which may, indeed, discourage newcomers in fields where RCA has become or seeks to become dominant.

A glance at RCA's last annual report⁵⁴ is convincing of the multifarious and pervasive character of its operations:

RCA's international radio-communication service is now "world-wide" and "globe circling," with direct circuits to 43 countries. Despite the suspension of service to half a dozen German-occupied countries, the volume of traffic handled in 1940 was "the greatest in RCA history." In addition, RCA's domestic radio-telegraph service "links 12 key cities in the United States."

The use of the international radio circuits is not restricted to message traffic. Newspapers receive many of their radiophotos from abroad through RCA. Foreign programs, particularly news, are transmitted over RCA circuits for broadcasting on domestic networks.

In the field of marine communication, RCA has "maintained its leadership," furnishing some 2,200 ships with radio equipment, and operating coastal and lake port stations.

RCA's manufacturing subsidiaries operate factories in New Jersey, Indiana, and California, and also in Canada and South America. The products include many types of radio and phonograph sets, radio tubes, broadcasting transmitters and studio equipment, Victor and Bluebird phonograph records, transcriptions for broadcasting, sound equipment for motion picture studios and theaters, and public address systems, to say nothing of motion picture and radio equipment for amateurs, electron microscopes, electronic pianos, television equipment, communications equipment, and so on. Manufacturing is now the largest single phase of RCA's business.

RCA is active in technical education, and through RCA Institutes, Inc., conducts schools in New York and Chicago which offer "training in all branches of radio." Its laboratories and research organizations are extensive.

NBC's position in broadcasting is comparable to the situation of the parent company in the broader field. There are four national networks; NBC owns two of them. Approximately one-quarter of all stations in the country, utilizing nearly half of the total nighttime power, are NBC affiliates. In the newer fields of international broadcasting, frequency modulation, television, and facsimile, NBC may be expected to play a major part.

The larger enterprises carried on by RCA do not blind its management to the smaller ventures which offer profitable opportunities. If broadcasters need transcriptions, NBC makes them. If broadcasters need talent, NBC will not only hire them, but is also glad to manage the artists and act as their agent in the concert as well as the radio field. Lately, with other members of the industry, it has

⁵⁴ RCA Annual Report for 1940, *passim*.

embarked upon a venture in musical copyrights (through Broadcast Music, Inc.—BMI.).

It is significant that these numerous and, for the most part, critically important activities require a capital investment which, in other fields of enterprise, would not be regarded as staggering. The assets of RCA barely exceed \$100,000,000; many a railroad, utility, bank, insurance company, or industrial establishment of relatively secondary importance has assets double or treble this amount. This tends to make RCA comparatively independent of the money market.

RCA, like many other giant enterprises today, is a "management corporation." It has nearly 250,000 stockholders. No one owns as much as half of 1-percent of its stock. In such circumstances, stockholder control is practically nonexistent. RCA's funded debt is small, so there is no substantial creditor influence on the management. As a result, the management is essentially self-perpetuating, and the responsibility of the executives and directors is largely intramural.

In short, RCA occupies a premier position in fields which are profoundly determinative of our way of life. Its diverse activities give it a peculiarly advantageous position in competition with enterprises less widely based. Its policies are determined by a management subject to little restraint other than self-imposed. Whether this ramified and powerful enterprise with its consistent tendency to grow and to expand into new fields at the expense of smaller independent concerns is desirable, is not to be decided here. We have thought it proper, however, to call the attention of Congress and the public to the broader problems raised by this concentration of power in the hands of a single group.

III. THE COLUMBIA BROADCASTING SYSTEM

A. FORMATION AND EARLY HISTORY

The organization which later became the Columbia Broadcasting System was incorporated in New York on January 27, 1927, under the name of United Independent Broadcasters, Inc. Its purpose was to contract for radio station time, to sell time to advertisers, and to furnish programs for broadcasting. Of its original four stockholders, two, Arthur Judson and an associate, were managers of concert artists primarily interested in creating a new market for their managed talent; a third, Edward Ervin, was assistant manager of the New York Philharmonic Symphony Society; and the fourth, George A. Coats, was a promoter.

In April 1927, before United began actual operations, the Columbia Phonograph Co., Inc., became interested in the project through the Columbia Phonograph Broadcasting System, Inc., which was organized on April 5, 1927, to function as the sales unit of the network. The outstanding stock of Columbia Phonograph Broadcasting System, Inc., was originally issued to Columbia Phonograph Co., Inc., which was active in its financing, and to four individuals.¹

The effective date of United's contracts with its original network, some of which were signed as early as March 1927, was September 5, 1927, but United experienced some delay in getting under way and the first program was broadcast over the network on September 25, 1927. United contracted to pay each of the 16 stations on its original network \$500 per week for 10 specified hours of time. The sales company was unable to sell enough time to sponsors to carry the network under this arrangement, and heavy losses were incurred because of the definite and heavy commitments entered into with the stations.

Because of these losses, the Columbia Phonograph Co. and the four individual stockholders withdrew from the venture in the fall of 1927 and all the outstanding capital stock of Columbia Phonograph Broadcasting System, Inc., was thereupon acquired by United.² The name of the sales company was changed to Columbia Broadcasting System, Inc., and on January 3, 1929, when the sales company was dissolved, United took over its activities and its name. Columbia Broadcasting System, Inc., has been the name of the network since that time.

In November 1927 Jerome H. Louchheim, Isaac D. Levy, and Leon Levy acquired a controlling stock interest in United and controlled the network until September 1928, when William S. Paley and his family purchased 50.3 percent of the stock. In December 1927 the

¹ Report on Communication Companies, pt. 3, p. 4009.

² Ibid. Eleven years later the Columbia Phonograph Co. was acquired by the erstwhile subsidiary. On December 17, 1938, CBS acquired the Columbia Phonograph Co., together with three other phonograph record companies, from Consolidated Film Industries, Inc., for \$700,000 cash. Poor's Industrial Manual (1938), p. 1276; (1940), pp. 790, 3023; *infra*, p. 25.

original affiliation contracts of March of that year were superseded by contracts which eliminated the commitment of United to pay for the station time under contract whether it was used or not. Under the new contract the station was required to pay United \$50 per hour for sustaining programs and United to pay the station \$50 per hour for broadcasting commercial programs.

In 1929 the Paramount-Publix Corporation, traded 58,823 shares of its own stock to CBS stockholders for all of the CBS class A stock, (50,000 shares), constituting 50 percent of the outstanding stock of CBS.³ It was agreed that if, during the ensuing 2 years, CBS should earn an average of 1 million dollars a year, Paramount would give the CBS stockholders who had taken Paramount stock the right to "put" the stock back to Paramount at \$85 per share. CBS earnings during the 2-year period were in excess of the stipulated amount, but at the end of the period, Paramount was not in a position to pay the agreed repurchase price in cash. Accordingly, the 1929 agreement was modified in the following manner: Paramount sold to CBS 14,156 shares of CBS stock at \$82.21 per share, which thereafter became "treasury" stock. It also surrendered the remaining 49,094 shares,⁴ *pro rata* to the individual stockholders of CBS, and received from them in return the Paramount stock. This transaction released Paramount from its obligation to pay for the stock at \$85 per share.⁵

Out of the 49,094 CBS class A shares returned by Paramount to the individual CBS stockholders, William S. Paley, acting on behalf of himself and other stockholders, sold 24,328 to a banking syndicate headed by Brown Brothers, Harriman & Co. at the same price per share as that used in the sale from Paramount to CBS of the "treasury" stock. The syndicate did not make a public offering of these shares, but placed most of them privately with a few individuals.⁶

The reason given for the sale of this stock by Paley and his associates to the syndicate was that they held about 10 or 11 million dollars worth of stock in CBS and they wanted to diversify their investments.⁷ Their voting power, however, was not diminished correspondingly; for, on March 10, 1932, at the conclusion of the Paramount transaction, the holders of the CBS class A stock were granted the privilege of cumulative voting in electing one-half of the company's directors, while the holders of the class B stock continued to vote noncumulatively. As of the time of the committee hearings, William S. Paley and his family held about 16 percent of the class A

³ At that time there were 17 CBS stockholders. To accomplish the sale to Paramount, the stock of CBS, which theretofore had been of 1 class, was divided into 2 classes, A and B, with equal number of shares. Each of the 17 stockholders received an equal number of A shares and B shares; and each stockholder then sold all his A shares to Paramount.

⁴ Between 1929 and 1932 the number of shares of class A stock in CBS held by Paramount had increased from 50,000 to 63,250. There had been an additional stock issue of 5,000 shares in each class, A and B, and Paramount had purchased 5,000 shares of class A stock to keep its equity in CBS at 50 percent, and thereafter there had been declared a stock dividend of 15 percent, which amounted to 8,250 shares and brought Paramount's total stock interest to 63,250.

⁵ The CBS stockholders did not hold the entire 58,823 shares of Paramount stock at that time; for 2 of the 17 stockholders had sold all of their Paramount stock on the market. The other 15 held in the aggregate 47,484 shares which they "put" to Paramount.

⁶ Testimony of Ralph F. Collin, General Counsel of CBS, *Hearings on the Nomination of Thad H. Brown, Senate Committee on Interstate Commerce, 76th Cong., 3d sess., June 12-August 23, 1940*, p. 164. As of December 1, 1938, Brown Brothers, Harriman & Co. were the record holders of only 2.33 percent of the outstanding class A stock.

⁷ *Ibid.*

stock and about 54 percent of the class B, or a total of about 33 percent of all the stock of CBS. Since there are 7 directors elected by each class of stock, the cumulative voting of the class A stock together with the noncumulative voting of the class B stock gives the Paley family the power to elect a majority of the entire board of directors of 14 even against the holders of the other 67 percent of the CBS stock.⁵

B. GROWTH OF CBS NETWORK

The original CBS network (then United) consisted of 16 stations. At the end of 1938, CBS had 113 outlets. The following chart shows the growth of the network:

Date (end of year)	Number of CBS outlets	Approximate percentage of CBS outlets to total number of licensed stations	Date (end of year)	Number of CBS outlets	Approximate percentage of CBS outlets to total number of licensed stations
1927	15	2.2	1934	97	16.6
1928	28	4.1	1935	97	15.7
1929	47	7.6	1936	93	14.4
1930	69	11.4	1937	110	18.0
1931	82	13.6	1938	113	15.7
1932	92	15.4	1940	117	15.3
1933	92	15.8	1940	121	14.6

Feb. 1.

The first station purchased by CBS was station WABC, its basic New York outlet, which was acquired in 1928. As of the time of the committee hearings, CBS was the licensee of nine stations, all of which were owned by it except WEEI in Boston, which it leased. In 1939 CBS sold one station,⁶ so that it is now the licensee of the following eight stations, all of which operate with unlimited time:

Station	Location	Power	Date of acquisition
WABC	New York	50,000	1928
WJSV	Washington	50,000	1932
WBT	Charlotte, N. C.	50,000	1929
WEEI	Boston	5,000	1936
WBBM	Chicago	50,000	1929
WCCO	Minneapolis	50,000	1931
KMOX	St. Louis	50,000	1931
KNX	Los Angeles	50,000	1936

⁵ On August 7, 1929, at the start of the Paramount transaction, the class A and class B stock carried identical rights and voting powers, except that each class of stock voting separately and noncumulatively elected one-half of the directors of CBS. After the Paramount transaction, the privilege of cumulative voting granted to the class A stockholders was the only difference between the rights and powers of the 2 classes of stock. At that time the board of directors of CBS consisted of 10 members; the class B stockholders, voting noncumulatively, elected 5 out of 10 directors and the holders of a majority of the class B shares were able to elect all 5 of these directors; while the class A stockholders, voting cumulatively, elected the remaining 5 directors, and holders of the class A stock had the right to elect 1 director for each one-fifth of the class A stock held. On March 24, 1937 (*New York Times*, March 25, 1937, p. 37), the board of directors was increased to 14, of which the holders of each class of stock had the right to elect 7. The holders of the majority of the class B stock had the power to elect 7 directors, while the holders of each one-seventh of the class A stock had the power to elect 1 director.

⁶ Station WKRC in Cincinnati, which had been acquired by CBS in 1931.

In addition, CBS now holds 45 percent of the stock of Voice of Alabama, Inc., the licensee of station WAPI in Birmingham, Ala., and it has a commitment to accept, by purchase of a new issue, 40 percent of the capital stock of Pacific Agricultural Foundation, Ltd., licensee of station KQW, San Jose, Calif.

In every year since and including 1929, CBS has operated at a profit. Both gross and net income have, with few exceptions, increased year by year as is shown by the following table:

Year	Time sales (after discounts; before agency commissions)	Net income (before provision for Federal income tax)	Year	Time sales (after discounts; before agency commissions)	Net income (before provision for Federal income tax)
Apr. 5, 1927, to Dec. 31, 1927	\$176,557	\$229,068	1934	\$13,690,649	\$2,631,407
1928	1,400,975	179,185	1935	10,391,565	3,228,194
1929	4,453,181	474,203	1936	21,449,676	4,498,983
1930	6,957,190	985,402	1937	23,737,627	5,194,588
1931	10,442,305	2,674,156	1938	25,450,351	4,329,510
1932	11,57,082	1,888,140	1939	30,061,490	6,128,686
1933	9,43,100	1,083,964	1940	35,630,063	7,431,634

* Agency commissions have also been deducted from the figure for this short period.

* Deficit.

* Includes sale of talent and other services.

C. MANAGEMENT OF ARTISTS BY CBS

In December 1930, CBS acquired 55 percent of the stock of Columbia Concerts Corporation, which had been organized that year by the merger of a number of concert artist managements. Columbia Concerts Corporation has been engaged in the business of managing concert artists in all fields of entertainment. Most of its business with respect to radio relates to the appearance of its managed artists on commercial programs over national networks. Practically all negotiations for the sale of its talent are carried on, and the contracts are made, with advertising agencies. The artists managed by Columbia Concerts Corporation have appeared frequently on commercial programs over NBC as well as CBS. Indeed, the total bookings of Columbia Concerts artists for appearances over NBC, from and including the 1931-32 season to January 1939, were greater than their bookings for appearances over CBS. For the fiscal year from June 6, 1937, to June 4, 1938, the total revenue of Columbia Concerts Corporation was \$426,413, and the profit for that period was \$94,038. For the 1938-39 season Columbia Concerts Corporation had under management contract approximately 120 artists and in addition about 17 dancing groups, special attractions, and ensembles.

Columbia Concerts Corporation, through a division of its business known as Community Concerts Service, engages in the business of organizing and managing concerts in various communities in the United States. As of the time of the committee hearings Community Concerts had concert courses in about 375 cities and towns. Its revenue from bookings for the fiscal year from June 6, 1937, to June 4, 1938, was \$165,454, and the profit for this period was \$20,418.

In addition to the concert artists managed by its subsidiary Columbia Concerts Corporation, CBS through another wholly owned sub-

subsidiary, Columbia Artists, Inc., also manages radio artists in all fields of entertainment. The income of Columbia Artists, Inc., comes from three sources: the booking of performances by managed artists, the sale of wires to hotels and night clubs from which dance bands are picked up, and income from the use of time by dance bands. At the time of the committee hearings, Columbia Artists, Inc., managed approximately 110 radio artists. For the 52 weeks ending January 1, 1938, the total revenue of Columbia Artists, Inc., was \$194,757 and its profit \$82,671.¹⁰

CBS' role as both employer of, and agent for, artists was the subject of complaint by independent artists' representatives just as in the case of NBC.¹¹

D. PHONOGRAPH AND TRANSCRIPTION BUSINESS OF CBS

On December 17, 1938, CBS purchased from Consolidated Film Industries, Inc., the capital stock¹² of the American Record Corporation which had the following subsidiaries: Brunswick Record Corporation, American Record Corporation of California, Columbia Phonograph Company, and Master Records, Incorporated. Upon acquiring the American Record Corporation, CBS changed the name of that company to Columbia Record Corporation and that company has carried on the manufacture of phonograph records for home use.¹³ In August 1940 it entered the transcription field.¹⁴

¹⁰ In California, the management activities of CBS with respect to both concert artists and radio artists are carried on through still another company, Columbia Management Corporation of California, Inc., which is owned jointly by CBS and Columbia Concerts Corporation. Columbia Management Corp. of California, Inc., performs a function in California similar to that carried on by Columbia Concerts Corporation and Columbia Artists, Inc., in other parts of the country.

¹¹ *Supra*, p. 17.

¹² In a suit by a minority stockholder in the Supreme Court of the State of New York it was alleged that a CBS director had purchased 20 percent of the stock and subsequently sold it to CBS at a profit. The Court found for the minority stockholder and ordered the director to make restitution to CBS of \$85,000. *Mason et al. v. Richardson et al.*, New York Law Journal, March 5, 1941, p. 892, column 2. CBS attorneys have announced they would probably appeal the decision. *Broadcasting*, March 10, 1941, p. 58.

¹³ *Poor's Industrials* (1949), p. 3023.

¹⁴ *Broadcasting*, August 1, 1940, p. 21.

IV. THE MUTUAL BROADCASTING SYSTEM

The Mutual Broadcasting System is organized along lines radically different from those of CBS and NBC. It does not own any stations, but it is owned by several stations. Mutual has no studios, maintains neither an engineering department nor an artists' bureau, and does not itself produce any programs except European news broadcasts. The commercial programs are produced by the originating station or by the sponsor who buys time, and the sustaining programs are selected from among those put on by the stations associated with the network.

A. FORMATION OF MUTUAL

On September 29, 1934, WGN Inc., Bamberger Broadcasting Service, Inc., Kunsky-Trendle Broadcasting Corporation, and Crosley Radio Corporation, the respective licensees of stations WGN at Chicago, WOR at Newark, N. J., WXYZ at Detroit, and WLW at Cincinnati, entered into an agreement for the purpose of securing contracts with advertisers for network broadcasting of commercial programs over their stations and making arrangements with the Telephone Co. for wire connections between the stations. WGN and WOR were to contract with the Telephone Co. for wire connections between the stations and all four stations agreed to share the expenses thus incurred.

In a supplementary contract of the same date, WGN and WOR agreed to organize a new corporation for the purpose of contracting with the Telephone Co. for the wire facilities required under the contract between the four stations. Stations WOR and WGN guaranteed the payment of any indebtedness of the new corporation to the Telephone Co. The new corporation provided for in the supplementary contract was the Mutual Broadcasting System, Inc., which was incorporated in Illinois on October 29, 1934, and which entered upon the business of selling time to advertisers over the four-station network and of making arrangements with the Telephone Co. for lines between the stations.

The capital stock of Mutual consisted of only 10 shares; of which WGN, Inc., and Bamberger Broadcasting Service, Inc., each held 5. WGN, Inc., is a subsidiary of the Tribune Co., which publishes the Chicago Tribune, and the Bamberger Broadcasting Service is a subsidiary of L. Bamberger & Co., which in turn is a subsidiary of R. H. Macy & Co. Ultimate control of the new network, accordingly, lay with the Chicago newspaper and the New York department store.¹

The arrangement among the four stations comprising the Mutual network was carried forward by a new agreement on January 31, 1935, but the network did not expand during that year. Under the

¹ On January 20, 1936, pursuant to an amendment of Mutual's corporate charter, the Crosley Radio Corporation, licensee of WLW, acquired five newly issued shares of Mutual stock. This ownership continued only until September 26, 1936, when Crosley returned the stock to Mutual.

new contract. Mutual agreed to pay the four stations their regular card rates for network programs broadcast over their facilities, deducting for itself a commission of 5 percent and such expenses as agency commissions and wire-line charges. Station WXYZ in Detroit left Mutual in September 1935 in order to join NBC, and was replaced by station CKLW, located in Windsor, Ontario, but serving Detroit as well, and owned by the Western Ontario Broadcasting Co., Ltd. On January 31, 1936, the four-station agreement was extended for another year, and Mutual's commission was reduced to $3\frac{1}{2}$ percent.

B. DEVELOPMENT OF THE MUTUAL NETWORK

Prior to 1936, WOR, WGN, WLW, and WXYZ (replaced by CKLW in 1935) were the only stations which regularly carried Mutual programs. During 1936, however, a number of stations were added to the network, including 13 in New England and 10 in California associated with regional networks (Colonial and Don Lee).

Mutual continued to increase the number of its associated stations throughout 1938, adding a Texas regional network of 23 stations during this period. As of January 17, 1939, shortly prior to the date on which Mutual presented its testimony at the committee hearings, the Mutual network included a total of 107 stations, of which 25 were also associated with NBC and 5 were also associated with CBS, and at the end of 1940 there were 160 outlets.

The following table shows the growth of Mutual:

Date (end of year)	Number of Mutual outlets ¹	Approximate percentage of Mutual outlets to total number of licensed stations
1934	4	0.7
1935	3	0.5
1936	39	6.0
1937	80	11.6
1938	107	14.8
1940	116	15.2
1940	160	19.3

¹ Station CKLW, Windsor, Ontario, Canada, is not included. See p. 15, n. 48.

² Jan. 17.

³ Feb. 1.

As the number of stations on the Mutual network increased, the structure of the network grew more complex. During the period in which only four stations were regularly associated with the network each contributed one-fourth of Mutual's expenses and wire-line charges. As more stations were added, three classifications were set up: member stations, participating members, and affiliates. At the time of the committee hearings in February 1939, there were two member stations, WGN and WOR, which held stock control of Mutual. The four participating member organizations were the Colonial Network; the United Broadcasting Co. (licensee of WHKC at Columbus and WCLE and WHK at Cleveland), the Don Lee Network, and the Western Ontario Broadcasting Co., Ltd. The remaining stations associated with Mutual were affiliates.

All network commercial time sold by Mutual is sold at the card rates of the stations. The two members and four participating members pay Mutual a commission of $3\frac{1}{2}$ percent, and share any network deficit, while the affiliated stations pay a commission of 15 percent. Stations associated with Mutual receive a 2-percent commission from Mutual on the proceeds of network time sold by them. The member stations underwrite all operating deficits and wire-line charges; and the participating members contribute in varying degrees toward the expenses of Mutual and their wire-line connections to Mutual's main line. The affiliated stations do not contribute toward the operating expenses or wire-line charges of Mutual as such, but, in addition to the commission of 15 percent they pay Mutual, in most cases they also pay the cost of the wire-line connection from their station to the Mutual main line.

Since the presentation of testimony by Mutual at the committee hearings during February 1939, several changes have taken place in its organization, as set forth in its brief of November 11, 1940. In January 1940 Mutual, which at that time was entirely owned by WGN and WOR, issued stock to five additional companies: the Don Lee Broadcasting Co., the Colonial Network, Inc., the Cincinnati Times-Star Co. (licensee of WKRC at Cincinnati), the United Broadcasting Co., and the Western Ontario Broadcasting Co., Ltd.² Mutual's board of directors was enlarged and an operating board was created for the purpose of giving representation to the nonshareholding affiliates.

The volume of Mutual's business has increased substantially since its formation, but is still not comparable to that of either NBC or CBS. The following table shows the network time sales (after discounts; before commissions) for each complete year through 1940:

1935	\$1, 108, 827
1936	1, 884, 615
1937	1, 650, 525
1938	2, 272, 662
1939	2, 610, 969
1940	3, 600, 161

² After this change the total issued capital stock of Mutual consisted of 100 shares which were held as follows: 25, WOR; 25, WGN; 25, Don Lee; 6, Colonial Network; 6, United Broadcasting Co.; 6, Cincinnati Times-Star Co.; 6, Western Ontario Broadcasting Co., Ltd.; 1, Fred Weber (qualifying share).

V. REGIONAL NETWORKS

In addition to the three national network organizations, there are a number of networks serving particular States or areas. These regional networks operate in much the same manner as the national networks but with much smaller coverage and revenues. Evidence concerning the following 13 regional networks was introduced at the hearings in this proceeding:

Name of network	Year established	Area served
California Radio System	1936	California.
Yankee Network, Inc.	1930	New England.
Colonial Network, Inc.	1936	Do.
Don Lee Broadcasting System	1932	California, Oregon, and Washington.
Pacific Broadcasting Co.	1937	Oregon and Washington.
Michigan Radio Network	1933	Michigan.
Texas State Network	1938	Texas.
Arrowhead Network		Northern Minnesota.
Empire State Network, Inc.	1938	New York State.
Inter-City Broadcasting System	1935	Cities in Northeastern States
Pennsylvania Network	1938	Pennsylvania.
Texas Quality Network	1934	Texas.
Virginia Broadcasting System, Inc.	1936	Virginia.

The first seven regional networks listed above are permanent organizations, have contractual relationships with their outlet stations resembling those of the national networks, and do a substantial amount of business. The following table gives a bird's-eye view of the relative importance in 1938 of these seven regional networks:

Name	Number of stations	Other network affiliations	Network net time sales (after agency commissions)
California Radio	9	None as network, but 6 stations individually affiliated with NBC.	\$109,848
Yankee	17	None as network, but 6 stations individually affiliated with NBC.	564,225
Colonial	14	Mutual	190,758
Don Lee	28	do	547,077
Pacific	14	Don Lee and Mutual	125,825
Michigan Radio	9	Basic Blue network of NBC	133,314
Texas State	23	Network affiliated with Mutual; 4 stations also outlets for NBC and 1 for CBS.	79,468

¹ Fiscal year ending Sept. 30, 1938.

² Sept. 15, 1938, to Jan. 31, 1939.

As the above table indicates, most of the stations on these major regional networks also carry the programs of a national network. Indeed, most of these regionals are affiliated with a national organization on a network basis.

The other six regional networks are of relatively minor significance. Several of them were temporary, their relations with their affiliates are rather loose, and the business accounted for by them is small.

The history, operations, station relations, and finances of all 13 regional networks are described in detail in Appendix D to this report.

VI. SCOPE AND MANNER OF OPERATION OF THE NATION-WIDE NETWORKS

In determining how best to cope with the problem of stations engaged in chain broadcasting, two matters are of especial importance.

One is the position of dominance in the broadcast field occupied by the two largest chain organizations, NBC and CBS. Because of the basic nature of the network broadcasting system, the ability to transmit high quality programs and the volume of commercial programs which flow through these companies, affiliation is a desirable factor for the individual broadcast stations. NBC and CBS were the first and second to enter the field (after the Telephone Co. abandoned broadcasting), and through the years they have taken steps to perpetuate their leadership and dominance.

The second set of circumstances is the nature of the contractual arrangements between networks and stations. These have a pronounced effect upon the service rendered by the affiliated stations.

In what follows, we shall occasionally contrast Mutual with NBC and CBS in respect to size, contractual structure, and mode of operation. It should be made clear that in making these contrasts we do not seek to approve Mutual practices or to set them up as ideals or models. On the contrary, we find a tendency in Mutual to follow the paths toward restrictive practices blazed by CBS and NBC. Mutual is chosen for contrast with the two larger chains merely because it is their only national competitor, and because in some respects the obstacles which it has faced clearly exhibit the restrictive effects of NBC and CBS practices.

A. PREDOMINANCE OF NBC AND CBS IN THE BROADCASTING FIELD

Of the three national network organizations, NBC and CBS are by far the largest and most powerful. Mutual was not organized until 1934; after the other two networks were already successfully established and had secured affiliations with a great number of the more desirable broadcast stations in the country.

1. Stations affiliated with NBC and CBS

At the time of the committee hearings in 1938, approximately 161 stations in the United States and the Territories and possessions were affiliated with the Red and Blue networks of NBC, 113 with CBS, and 107 with Mutual. At the end of 1940 the figures were, respectively, 214, 121, and 160. These figures, however, do not give an accurate picture of the relative predominance of NBC and CBS, for, by and large, the stations associated with Mutual are less desirable in frequency, power, and coverage.

The networks operated by CBS and NBC at the end of 1938 were composed of 267 stations in the United States. The 267 stations were classified, as to power and time designation, as follows:

Item	Class and time designation	Number commercial stations in networks of CBS and NBC			In United States	Ratio of number in networks to total number
		CBS	NBC	Total		
						Percent
1	Clear channel (50 kw. or more) unlimited time	11	17	28	30	93.3
2	Clear channel (50 kw. or more) part time		4	4	4	100.0
3	Clear channel (5 kw. to 25 kw.) unlimited time	5	9	14	14	100.0
4	Clear channel (5 kw. to 25 kw.) part time	2	2	4	4	100.0
5	Total clear channel	18	32	50	52	96.2
6	Regional (high power) unlimited time	4	4	8	8	100.0
7	Regional (1 kw. to 5 kw.) unlimited time	58	80	138	196	76.4
8	Regional (250 w. to 5 kw.) limited and daytime	2	3	5	68	7.4
9	Regional (250 w. to 5 kw.) part time	4	8	12	33	36.4
10	Total regional	68	95	163	305	53.4
11	Local (50 w. to 250 w.) unlimited time	20	33	53	227	23.3
12	Local (50 w. to 250 w.) day and part time	1		1	76	1.3
13	Total local	21	33	54	303	17.8
14	Total	107	160	267	660	40.5

It may be seen from the foregoing table that CBS and NBC together had in their networks all but two of the clear channel stations (WGN and WOR, which own Mutual), and most of the full-time regional stations. Excluding low-powered local stations, more than half of all the stations in the country were affiliated with CBS and NBC, and even including the full-time local stations, more than half of all stations were so affiliated.

Another index of network predominance is found in the proportion of the Nation's broadcasting power utilized. The 475 unlimited-time commercial stations in the United States at the end of 1938 accounted for 86.3 percent of the total time sales of all 660 commercial stations and had a total nighttime power of 1,869,400 watts¹ or 97.9 percent of the total. This total was distributed as follows:²

Total number of commercial stations		Number of unlimited-time stations	Total night watts of unlimited-time stations	Percentage of watts of unlimited-time stations
135	Affiliated with NBC only	119	959,950	51.4
162	Affiliated with CBS only	93	658,050	35.2
74	Affiliated with Mutual only	55	117,350	6.3
25	Affiliated with NBC and Mutual	25	82,800	4.4
7	Affiliated with CBS and Mutual	5	11,200	.6
341	Total affiliated with national networks	297	1,824,350	97.9
319	Total unaffiliated with national networks	178	40,050	2.1
660	Totals	475	1,869,400	100.0

¹ This figure includes WLW as a 50,000-watt station. Its normal power, although it operated experimentally on 500,000 watts until March 1, 1939.

² The inclusion of part-time stations or use of daytime power ratings, would not markedly alter the above ratios.

Stations on the NBC and CBS networks alone thus had over 85 percent of the Nation's nighttime wattage.

2. Ownership of stations by NBC and CBS

Apart from contractual affiliation, NBC and CBS have cemented their position as the leading radio networks by the acquisition of stations having excellent power and coverage. NBC is now the licensee of 10 stations,³ of which 7 are clear-channel stations operating with the maximum power (50,000 watts) permissible under our regulations. CBS is the licensee of 8 stations,⁴ of which 7 are clear-channel stations, operating with 50,000 watts. Almost half of the Nation's highest power clear-channel stations, accordingly, are licensed to CBS and NBC. Four other important stations in three leading markets (Washington, San Francisco, and Boston) are also licensed to NBC or CBS.

3. Proportion of broadcasting business handled by NBC and CBS

The predominance of NBC and CBS within the broadcast industry is further indicated by the distribution of proceeds from net time sales among the various units in the industry. The net time sales for the entire industry (all networks and 660 stations throughout the country) in 1938 amounted to \$100,892,259, of which \$44,313,778, or 44 percent, represented NBC and CBS network net time sales. The 23 stations owned or operated by NBC and CBS,⁵ most of which were located in well-populated and lucrative markets, had net time sales for nonnetwork programs of \$6,734,772, or 7 percent of the total net time sales of the entire industry. Accordingly, the CBS and NBC networks and the stations owned or operated by them accounted for more than one-half the total business of the entire industry. In sharp contrast, the 1938 net time sales of Mutual were only \$2,015,786, or about 2 percent of the net time sales of the industry.

4. Payments to stations affiliated with NBC and CBS

Of their total network net time sales in 1938 (\$44,313,778), CBS and NBC retained 73 percent (\$32,046,218) and paid only 27 percent (\$12,267,560) to the 253 affiliated stations on their networks during the year. Thus CBS and NBC retained over two and a half times as much of the proceeds from the sale of network time as they paid to all the 253 affiliated stations. This is accounted for in part by the usual contractual arrangements under which sustaining programs and wire-line connections are furnished to the affiliates without a separate charge.

Of the amount retained by CBS and NBC (\$32,046,218), the 23 stations owned or controlled by them were credited with \$5,347,388 as compensation for the broadcasting of network programs. This amount is more than one-third of the amount which was paid by NBC and CBS to the 253 affiliated stations. The large amount "paid" by

³ *Supra*, p. 16.

⁴ At the time of the committee hearings CBS was the licensee of nine stations. See *supra*, p. 23, n. 9.

⁵ These 23 stations include 19 licensed to CBS and NBC and 4 (treating WBZ and WBZA as 1) operated by NBC under management contracts. *Supra*, p. 16. ?

the networks to their own stations is accounted for, in part, by the power and favorable market location of these stations.

5. Proportion of industry income received by NBC and CBS

The predominance of network organizations and their owned and controlled stations in relation to the industry as a whole, is further demonstrated by reference to net operating income.⁶ The consolidated net operating income of the entire industry for 1938 was \$18,854,784, of which \$4,349,446 was operating income of the three national network organizations from network operations, and \$14,505,338⁷ was that of the 660 stations, including payments to them by networks for the broadcast of network programs. This latter amount in turn was composed of \$9,696,156, in the aggregate, for the 327 stations affiliated with but not owned or operated by the three major networks;⁸ \$4,958,289, in the aggregate, for the 23 stations owned or operated by CBS and NBC;⁹ and a loss of \$149,107, in the aggregate, for the 310 unaffiliated¹⁰ stations. The consolidated net operating income of NBC and CBS from network programs (\$4,319,062) plus the consolidated net operating income of the 23 stations which they owned or operated (\$4,958,289) equalled about one-half of the consolidated net operating income for the entire industry.

Mutual's net operating income for 1938 totaled only \$30,384. This is accounted for by the fact that Mutual is in effect a cooperative enterprise, rendering service to its associated stations, substantially at cost.

6. Income and investment¹¹ of NBS and CBS

The broadcasting industry does not require large capital investments. The NBC and CBS investment in tangible property devoted to broadcasting at the end of 1938 totaled \$9,276,019. In that year their net operating income (\$9,277,352) was actually in excess of this investment in tangible property. Their entire broadcasting investment, including intangible as well as tangible items, was \$13,411,102; their net operating income was equal to 69 percent of this amount.

NBC's investment in tangible property at the end of 1938 totaled \$4,284,032. Its earnings for that year (\$3,434,301) equaled 80 percent of this investment.

CBS had an investment in tangible property at the end of 1938 amounting to \$4,991,988 and during that year its net earnings¹² (\$3,541,741) equaled 71 percent of its investment in tangible property.

7. Disposition of NBC and CBS profits

NBC and CBS profits have been large, and for the most part have been distributed to stockholders. In the case of NBC, total earnings

⁶ Broadcast revenue less broadcast expenses—referred to in the published tabulations of the Federal Communications Commission as broadcast income.

⁷ Four hundred and twenty stations showed net incomes totaling \$16,728,533; 240 showed net losses totaling \$2,223,195.

⁸ Of these, 238 showed net incomes totaling \$10,753,650; and 89 showed net losses totaling \$1,057,494.

⁹ Of these, 20 showed net incomes totaling \$5,086,390 and 3 showed net losses totaling \$128,101.

¹⁰ Of these, 162 showed net incomes totaling \$888,493, and 148 showed net losses totaling \$1,037,600.

¹¹ Investment in tangible property is based on cost less depreciation. Investment in intangible property is based on cost less amortization.

¹² Broadcast and nonbroadcast income less broadcast and nonbroadcast expenses.

from November 1, 1926, the date of its formation, through 1938, totaled \$22,319,833. NBC began to pay dividends in 1935, and from 1935 through 1938 paid to RCA, its only stockholder, \$18,100,000 (cash dividends of \$14,900,000, lease negotiation fees of \$2,200,000, and research and development fees of \$1,000,000). Of the remaining \$4,219,833, losses on financial investments unrelated to broadcasting have consumed \$1,171,763; and \$673,333 appropriated for goodwill and other intangibles has been charged off. At the end of 1938 \$2,374,738 remained on the company's books as earned surplus.

CBS net earnings during the 12-year period of its existence through 1938 totaled \$23,522,471. Of this amount, \$13,329,688 has been paid to its shareholders in cash dividends, and \$3,543,175 in stock dividends; the remainder was largely current assets at the end of 1938.

B. CONTRACTUAL ARRANGEMENTS BETWEEN NATIONAL NETWORKS AND AFFILIATES

At the present time, the relations between a network organization and its affiliates are customarily governed by a detailed written contract. These relationships, however, have not always been on such a formalized basis. Before NBC took over the Telephone Co.'s network in 1926,¹³ the relations between the network and its affiliates were embodied in correspondence only. The arrangements generally called merely for the furnishing of programs by the company on a few specified evenings. The company would pay the affiliated station a certain amount per hour for broadcasting network commercial programs, and the affiliate would pay the company a certain amount for sustaining programs.

When NBC took over station WEAJ and the Telephone Co. network, it assumed these informal contractual arrangements. The amount of network service, however, increased rapidly after NBC took control. The network service supplied by the Telephone Co. had been quite sporadic; network programs were not available to affiliated stations at all hours throughout the broadcast day. But as early as 1927, NBC was on a 16-hour-per-day broadcasting schedule, and at the time of the committee hearings in 1938 NBC's broadcast day was 17 hours.

Despite this great increase in the volume of its network operations, NBC maintained its relations with its affiliates on the informal basis described above for a number of years. Unlike NBC, however, CBS adopted a formal contractual relationship with its affiliates from the very start of its network operations in 1927. As both networks grew, and competition between the two approached an equal footing, NBC also introduced formal contracts. Today NBC and CBS uniformly embody their arrangements with affiliates in detailed contracts. Since its inception in 1934, Mutual has defined its relationships with its outlet stations in detailed and standardized contracts.

The committee report states that "the heart of the abuses of chain broadcasting is the network-outlet contract." It is important to scrutinize these contracts and to determine whether station licensees have entered into arrangements which adversely affect the public interest.

¹³ *Supra*, p. 7.

The discussion which follows concerns the standard or typical contract provisions of the three national networks; no attempt has been made to deal exhaustively with detailed exceptions to such provisions found in some individual contracts.

1. Length of affiliation contracts

Prior to 1936, NBC standard affiliation contracts were for 1 year only. Since 1936, standard contracts have been drawn to bind affiliated stations for 5-year periods but NBC for only 1, since NBC has the right to cancel on 12 months' notice.

The early CBS¹⁴ affiliation contracts were for 1 year only. In August 1929, however, CBS entered into new contracts for 2-year periods, with options granted to CBS to extend for two successive terms of 1 year each. Since 1936, CBS, like NBC, has entered into contracts binding affiliated stations for 5 years, but binding upon itself for only 1.¹⁵ The termination dates of both CBS and NBC contracts are staggered so that some contracts expire each year.

As of the time of the committee hearings, Mutual's affiliation contracts bound both parties for the same length of time, 1 year.¹⁶

2. Exclusivity

The original CBS affiliation contract, effective September 1927, enjoined CBS affiliates from making their facilities available to any other chain broadcasting company; a similar "exclusivity" provision has appeared in subsequent contracts. It was not until 1937, however, that a provision was incorporated which enjoined CBS from furnishing programs to other stations in territories served by its affiliates. The present clause, from the standard affiliation contract introduced in 1937, reads:

Columbia will continue the station as the exclusive Columbia outlet in the city in which the station is located and will so publicize the station, and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The station shall be free to join occasional local, State-wide or regional hook-ups to broadcast special events of public importance.

NBC did not introduce exclusivity provisions until 1936. Since then its standard contract has contained a clause prohibiting a station from supplying its facilities to any other major network. The clause reads:

For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations comprising radio networks, you agree not to permit the use of the station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of 1 million or more inhabitants.

¹⁴ "CBS" refers here and sometimes hereafter not merely to "Columbia Broadcasting System, Inc." but also to its predecessor "United Independent Broadcasters, Inc." The change of name occurred on January 3, 1929.

¹⁵ The standard contract of 1936 was for 1 year but gave CBS four successive options to extend for 1 year each. The present standard contract, introduced in 1937, is for a term of 5 years with the right granted to CBS to terminate upon 12 months' notice.

¹⁶ In January 1940, however, Mutual entered into contracts with its seven stockholders, binding on Mutual for 5 years, but cancellable by the stockholders on 1 year's notice at any time after the first 2 years.

The NBC vice president in charge of station relations testified that this clause was designed to prevent NBC outlets from affiliating with "any network which would seek to establish itself as a national advertising medium," and thus compete with NBC. NBC affiliates, he stated, are permitted to affiliate with such regional networks as the Yankee; but—

* * * If it [Yankee] seeks to extend itself beyond the confines of New England * * * then we will raise objection * * * to the continuance of its affiliation with the National Broadcasting Co. If the Yankee network, for example, should make up its mind * * * to become a national network, it would be perfectly within their right to do so, but they should not expect to be supported by NBC programs (Hedges, Tr. 1868).

The same NBC representative further testified that, although all NBC affiliates are not as yet bound by exclusivity clauses, NBC's policy is to attempt to procure such clauses in all contracts. There was also testimony that NBC recognized its affiliates as its exclusive outlets in their areas.

At first, Mutual did not demand exclusivity provisions from its affiliates. The only exception was its contract with the Don Lee network. The parties to this contract state that when it was made, they had to assume a long-term commitment to the Telephone Co. for a wire-line connection between Chicago and Los Angeles; and that to protect this commitment, Don Lee agreed not to accept programs from any other national network and Mutual agreed not to send its programs to any other stations on the Pacific coast. There was testimony on behalf of Mutual that, since this long-term wire commitment is no longer necessary, it is willing to negotiate a new contract with Don Lee without exclusivity provisions.

Since February 1, 1940, Mutual's contracts with its 7 stockholders prohibit the 50 or more stations owned by these stockholders or affiliated with their regional networks from broadcasting programs of any other national network, or any other network having outlets in New York, Philadelphia, and Chicago. Mutual states that these clauses were designed to prevent its dismemberment by Transcontinental Broadcasting System, Inc., a proposed new network planned during the winter of 1939. The stockholders' contracts provide that the exclusivity clauses shall lapse if the Federal Communications Commission prohibits them, or if the other national networks voluntarily abandon exclusivity.

Clauses prohibiting Mutual from supplying programs to other stations in territories served by its affiliates were contained in some Mutual affiliation contracts as of the time of the committee hearings, and a Mutual official testified that as a matter of practice Mutual does not send its programs to any station in the area of an existing outlet.

3. Time options

By the terms of its first standard affiliation contract, effective September 5, 1927, United Independent Broadcasters, predecessor of CBS, purchased 10 specified hours per week outright from its 16 affiliates at \$50 per hour. United lost so heavily on this contract that, although it was for a period of 53 weeks from September 5, it was superseded in December 1927 by a new type of contract.

This second contract bound United to furnish 10 hours of programs a week, at least half of them commercial, and gave United conditional options¹⁷ on an additional 20 specified hours.¹⁸ This was the first introduction of the time-option arrangement which has since become standard for both NBC and CBS.

The third standard contract, dated November 1928, committed CBS to supply network programs for twenty specified hours per week, and gave it an option to take up, on 30 days' notice, 10 additional specified hours per week. The periods covered by contract and option were the same as in the preceding contract.

The next CBS standard affiliation contract, dated August 1929, granted to CBS an option¹⁹ on all the time of the station for network commercial programs. This option on all station time has been continued and is the rule today, subject to two limitations introduced at the end of 1937. One provides that a station may require CBS to give not less than 28 days' prior notice before preempting time for programs sponsored by new accounts. The other provides that a station need not broadcast network commercial programs for more than 50 "converted hours"²⁰ in any one week. Since CBS, at least prior to the time of the committee hearings, had never used 50 "converted hours" over any station in any week, the latter provision has never actually functioned to limit the all-inclusive option.

NBC inaugurated a system of network optional time in 1933. The NBC standard contract clause provides that upon 28 days' notice to a station, NBC can preempt time for commercial network programs during specified hours known as "network optional time."²¹ From its 29 affiliates on the West coast, however, NBC has options covering all time; the reason is stated to be the time differential between New York and the Far West.

Prior to February 1, 1940, Mutual had no time-option provisions in its affiliation contracts. It entered into definite commitments with advertisers only after it had communicated with associated stations to determine whether or not the time was available. If the particular period had already been sold by any associated station, that station was under no obligation to make it available for network commercial programs.

On February 1, 1940, however, Mutual entered into time-option contracts with its 7 stockholders covering the 50-odd stations owned by them or affiliated with their regional networks. The options covered from 3 $\frac{1}{4}$ to 4 $\frac{1}{4}$ specified hours on week days and 6 hours on Sundays. The contracts expressly provide that the time-option provisions shall lapse if the Federal Communications Commission prohibits the practice or the other national networks voluntarily abandon it.

¹⁷ United was given the privilege of using 6 additional specified hours as soon as permanent telephone wires were installed at each station; and, upon 30 days' notice, it was given the option and right to increase the hours to include any of 14 specified hours should additional advertising warrant.

¹⁸ The 20 hours specified in the contract included the period from 7 to 11 p. m. 7 days per week and from 3 to 5 p. m. on Sundays.

¹⁹ This contract was silent concerning the amount of notice necessary prior to exercise of options.

²⁰ One evening hour or 2 daytime hours are generally equivalent to 1 "converted hour"; a Sunday afternoon hour equals two-thirds a "converted hour." 50 "converted hours" on the average require 79 clock hours.

²¹ NBC "network optional time" includes the following hours: week days, 10 a. m. to 12 noon; 3 to 6 p. m.; 7 to 7:30 p. m.; and 8 to 11 p. m.; and Sundays, 1 to 4 p. m.; 5 to 6 p. m.; and 7 to 11 p. m.

4. Rejection of network commercial programs

All three national networks have standard contract clauses defining the right of stations to reject network commercial programs.

The NBC standard clause, introduced in 1933, reads:

Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated . . . a network optional time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity.

Since the Communications Act of 1934 imposes upon broadcasting stations the duty to operate in the public interest, this clause in effect does little more than permit affiliated stations to reject network commercial programs when to broadcast them would violate the law. The provision is interpreted by NBC to mean that a station may reject a network commercial program if the program or the product advertised is objectionable to the community, or if the station wants to substitute a local sustaining program of public interest. The NBC vice president in charge of the station relations testified:

. . . If the station believes that the substitution of a local program would be more in the public interest than the program which was offered to him by the network he makes that substitution, but we insist that he must be on firm ground, that he must be able to support his contention that what he has done has been more in the public interest than had he carried on the network program (Hedges, Tr. 1795).

While an affiliated station may substitute a local sustaining program for a network commercial program under such circumstances, it may not similarly substitute a local commercial program. Indeed, the NBC standard affiliation contract has a special provision for liquidated damages which compels the affiliate to pay over to NBC whatever increased revenue it receives from such substitution:

Provisions for liquidated damages.—In the event you substitute a program for a network program which you are obligated to broadcast hereunder you agree to pay us as liquidated damages a sum equal to the amount by which the total moneys you receive for broadcasting the substituted program during the scheduled period of said network program exceeds the moneys you would have received from us had you broadcast said network program. This provision is without prejudice to any other rights which we may have under this agreement arising from your failure to broadcast any of our network programs, and shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified in the foregoing sentence.

This clause effectively removes all monetary incentive to substitute local commercial for network commercial programs.

The CBS clause covering rejection of programs, first introduced in 1937, reads:

The station will broadcast all network sponsored programs furnished to it by Columbia during the time when the station is licensed to operate . . . Either the station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied. . . .

This clause, like the similar clause in NBC contracts, provides in effect merely that stations may reject programs if to carry them would violate the public-interest provision of the Communications Act of 1934.

As has been noted, Mutual held no options on station time at the time of the committee hearings. No Mutual station was required to accept a network commercial program unless it had the time available, and even then it could reject for any of several reasons. A typical Mutual contract reads:

* * * It is agreed that each station shall have the right to refuse to accept any contract tendered to it hereunder:

(a) If in the opinion of the station management the programs which the advertiser purposes to broadcast under such contract are for any reason unsatisfactory in character, quality, or content; or

(b) If in the opinion of the station management the products to be advertised are undesirable or objectionable; or

(c) If the station management determines in its sole discretion that the advertiser is not a good credit-risk.

It should be noted that the Mutual clause explicitly places the right to determine whether a program is objectionable in the hands of the individual station, where the legal responsibility also lies. Moreover, even after a station commits itself to broadcast a network commercial program, it reserves the right to appropriate any or all of the time for broadcasting a local sustaining program of unusual interest.

The basic problem with respect to rejection of network programs, however, does not rest merely in the precise wording of legal contracts. There is also involved the practical problem of supplying stations with enough information about network programs sufficiently in advance to enable them to make intelligent decisions.

At present, networks send their affiliates notices stating the length of the program series, the length of each program, the time of broadcasting, the name of the sponsor, the product to be advertised, and the general type of program; that is, whether it is to be variety, drama, dance music, etc. In some cases the names of the persons appearing on the program may also be given. It is obvious that from such skeletal information the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions.

In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs.

5. Sustaining programs

NBC and CBS actually produce a great many of their sustaining programs. They spend large sums of money for such production,

as well as for the broadcasting of sustaining programs which they do not themselves produce, such as concerts and special events. Mutual, on the other hand, does not produce sustaining programs itself; it selects programs which it considers suitable for its network from among the sustaining programs produced by its outlets, and distributes such programs to the other stations on the network.

All three national network companies make sustaining programs available to their respective affiliates at no separate charge; but the cost of producing and distributing them is reflected in the plan of station compensation.

NBC guarantees most of its outlets 200 "unit hours"²² of network commercial and sustaining programs during each 28-day accounting period; CBS guarantees 60 clock hours a week; and Mutual makes no guarantees. In practice, however, all three networks make programs available throughout the broadcast day—generally 16 or 17 hours.

Unlike network commercial programs, sustaining programs may be accepted or rejected at will by stations affiliated with (but not licensed to) any of the 3 network organizations. The stations licensed to NBC and CBS, however, are required to broadcast certain so-called "immovable" sustaining programs. NBC Red network immovables numbered 22 at the time of the committee hearings, including the Radio Pulpit, the University of Chicago Round Table, The World Is Yours, and the Metropolitan Opera. The 24 Blue network immovables included the NBC Symphony Orchestra, Dr. Walter Damsch's Music Appreciation Hour, the Farm and Home Hour, and America's Town Meeting of the Air. CBS "must" sustaining programs for the stations licensed to it totaled 6½ hours per week, and included the New York Philharmonic Symphony Orchestra, the CBS School of the Air, and certain educational programs. Mutual owned no stations, and hence had no immovable sustaining programs.

6. Station compensation

The early NBC arrangements for compensation to and from its affiliates were modelled on previous arrangements between the Telephone Co. and its affiliates.²³ One of the last Telephone Co. network contracts,²⁴ for example, provided that the station would pay \$45 per hour for sustaining programs, and would receive \$40 per hour for commercial programs. Similar arrangements were continued after NBC took over the network, and hourly rates were in general standardized. From 1927 to 1930, NBC paid most of its stations \$50 per evening hour and \$30 per daytime hour for commercial programs, and charged most of them \$45 per evening hour and \$25 per daytime hour for sustaining programs. The exceptions were the few stations so necessary to NBC that they could insist upon increased rates from NBC for commercial programs or lower charges for sustaining programs.

NBC maintained the same commercial rates from 1930 to 1932, but sustaining-program charges were reduced to \$25 per evening hour and \$15 per daytime hour. In 1932, hourly charges for sustaining programs were abolished, and a flat charge of \$1,500 per month sub-

²² A "unit hour" is equivalent to 1 evening hour. A Sunday afternoon hour counts as three-fourths of a unit hour and a daytime hour counts as one-half.

²³ *Supra*, p. 34.

²⁴ Contract between the Telephone Co. and the owners of station WLIT in Philadelphia, dated September 10, 1936.

stituted, regardless of the number of sustaining programs the station used.

In 1935, NBC introduced a new system of payments to stations in connection with a readjustment of station rates to advertisers which rates, with minor changes, have remained in effect. NBC has stated that, in establishing these rates, it gave primary consideration to the "potential circulation" or number of potential listeners in the area served by each station; and that it did not take into account such factors as the number of stations serving the area or the purchasing power of its inhabitants.

Advertisers were charged from \$120 per evening hour for the smallest stations to \$680 per evening hour for larger stations, \$720 for WMAQ and WENR in Chicago, and \$1,200 for WEF and WJZ in New York and WLW in Cincinnati.

Stations were remunerated according to a complex formula based upon these rates to advertisers. For the first 16 "unit hours" of network commercial programs during each 28-day accounting period, a station received no compensation; for the next 25 unit hours it received 20 percent of the average unit rate;²⁵ for the next 25 unit hours it received 30 percent; and thereafter 37½ percent. Under this schedule, stations were not required to pay separately for sustaining programs.

The following table shows NBC network time sales, its receipts from sustaining program charges, its payments to affiliated stations, and other relevant figures:

Year	Time sales for network programs (after discounts; before commissions)		Compensation to stations for broadcasting network programs	
	Commercial programs	Sustaining programs sold to stations	Amount	Ratio to network time sales (percent)
Nov. 1926-Dec. 1927	\$3,384,519	\$500,607	\$577,522	17.06
1928	7,256,179	770,702	1,486,146	20.48
1929	11,353,120	726,335	2,372,740	20.90
1930	15,701,331	698,001	3,038,112	19.35
1931	20,455,210	903,615	3,962,047	19.37
1932	20,915,979	980,818	3,911,346	18.70
1933	18,005,369	987,587	3,383,965	18.79
1934	23,535,130	1,021,247	5,000,650	21.25
1935	26,679,834	941,428	5,875,188	22.02
1936	30,148,753	(²⁶)	6,123,749	20.31
1937	31,436,874	60,384	7,166,363	22.80
1938	31,783,267	20,470	7,809,614	24.57
1939	33,840,841	19,368	9,021,872	26.90
1940	37,418,130	19,693	10,562,212	28.45

¹ "Stations" in this table refers to stations affiliated with but not owned or operated by NBC.

² Total time sales; network time sales not available.

³ Charges for sustaining programs were abolished by NBC as a part of its network relationship with stations after the revision of its rate structure and system of compensation in 1935.

CBS's arrangements for station compensation have been somewhat different. In its first standard affiliation contract, in effect from September to December 1927, the network agreed to pay each station \$50 per hour for 16 specified hours per week whether or not the hours were actually used by the network. This arrangement was modified in the second contract, dated December 1927, which provided that CBS was to pay the station \$50 per hour for all hours

²⁵ The "unit rate" is the gross card rate per hour, before deducting discounts or agency commissions.

used commercially and to supply sustaining programs for the remainder of the time covered by the contract, charging the station \$50 per hour for them. The contract provided that at least 50 percent of the hours used by CBS must be devoted to sponsored programs.

The third CBS contract, dated November 1928, eliminated payments by the station for sustaining programs and provided that the station waive compensation for the first 5 hours of commercial network programs per week. For all network commercial hours in excess of the free time, CBS agreed to pay each station a specified hourly rate. CBS agreed also to furnish sustaining programs for all hours not used for commercial programs, which were either under contract or under an option exercised by CBS.

The next standard affiliation contract, that of August 1929, established the method of compensation which has remained in effect since. A distinction was made for the first time between an evening and a daytime hour. The term "commercial hour" was defined to include only an evening hour, and it was provided that the compensation to the station for a daytime hour was to be one-half its evening compensation and that the 5 hours of commercial programs per week on which the station waived compensation were to be "commercial hours" as defined in the contract. A "commercial hour" was referred to in later affiliation contracts of CBS as a "converted hour."

Charges to advertisers for the use of CBS network facilities are determined by the CBS rate card, which lists the stations available, the groups in which they must be purchased, and station rates ranging from \$125 to \$1,250 per converted hour. The rate applicable to each station is determined by CBS after a consideration of the station's market, its relative popularity, its power and physical coverage, and the price at which it sells time to national advertisers for national spot business.

The following table shows the increase in annual sales of network time by CBS from 1927 through 1940, the increase in payments to affiliated stations, and the ratio of those payments to the network time sales of CBS:

Year	Time sales for network programs (after discounts, before commissions)	Compensation to stations for broadcasting network programs	
		Amount	Ratio to network time sales (percent)
1927 (Apr.-Dec.)	\$176,558	(1)	
1928	1,409,975	(2)	15.55
1929	4,720,074	\$734,163	12.41
1930	8,082,664	1,003,749	12.59
1931	9,480,282	1,478,307	15.59
1932	10,218,800	1,805,211	17.67
1933	8,008,088	1,446,827	18.07
1934	11,888,741	2,604,854	21.91
1935	14,087,605	3,394,428	24.09
1936	18,550,621	4,806,669	25.91
1937	21,999,089	5,556,623	25.29
1938	27,254,686	4,969,688	23.38
1939	30,450,511	6,933,887	26.21
1940	31,181,444	8,722,303	27.97

1 "Stations" in this table refers to stations affiliated with but not owned or operated by CBS.

2 Total sales; network time sales not available.

3 Not available.

Mutual has no network rate card similar to that of NBC or CBS; it charges advertisers at the card rates of the stations associated with it. Mutual does not set these rates and has no control over them.

Mutual receives a 3½ percent commission on all proceeds, after agency commissions, from network programs broadcast over the facilities of its "members" and "participating members"; and 15 percent in the case of its "affiliated stations." All stations on the network, regardless of category, receive a 2 percent commission on the proceeds of programs which they sell on behalf of the network.

Mutual "affiliates" pay for the telephone circuits from their facilities to the nearest connecting point on the Mutual line. WOR and WGN, the two "member stations," each pay a share of Mutual's budgeted operating expenses; each was paying \$3,775 per month at the time of the committee hearings. They also guarantee Mutual's telephone circuit expenses, and underwrite equally any operating deficit which Mutual may incur. Mutual's "participating members" have various arrangements. Colonial pays for its telephone circuit to the Mutual main line in New York; Don Lee contributes five-eighths of the telephone circuit expense from Chicago to the coast. Each contributes to Mutual's budgeted operating expenses equally with WGN and WOR. United Broadcasting Co. pays the cost of the telephone line connecting it with the Mutual system, plus \$2,775 per month toward operating expenses. CKLW guarantees to Mutual all the proceeds up to \$30,000 of annual net time sales of Mutual programs over its facilities. It pays Mutual 85 percent of the proceeds from the next \$25,000 of such sales and 50 percent of sales in excess of \$55,000.

Mutual contends that their associated stations receive a greater share of the proceeds from Mutual network business than do the stations associated with the other two national networks. This is true, since Mutual is a cooperative enterprise. It should be noted, however, that many of the expenses borne by NBC and CBS are, in the case of Mutual, borne by the stations. Whether or not, if computations on a basis comparable to those made in the case of NBC and CBS were possible, Mutual stations would be shown to receive a larger proportion of the network intake cannot be determined.

7. Network control over station rates

The rate at which NBC bills advertisers for the use of each outlet is specified in the NBC rate card, and also in the NBC affiliation contract with that outlet. The rate usually referred to as the "station rate" is the rate for an evening hour. The rate for other periods is derived by multiplying the evening-hour rate by the appropriate fraction; one-half for a daytime hour, three-quarters for a Sunday afternoon hour and one-third for an hour after midnight.

NBC retains for itself effective control over network station rates. It may increase the network station rate of any affiliate, and it may decrease the network station rate of any affiliate upon 90 days' notice, if at the same time it reduces the rates of a majority of its affiliates. Moreover, it may decrease a single station's rate on 1 year's notice; but if it does so, the station has the option of terminating the affiliation contract. An outlet station does not have the power either to

raise or lower its network rate during the period it is bound to NBC by an affiliation contract, the standard term of which is for 5 years.

Some time after 1935, a clause was incorporated in the standard NBC affiliation contract, which provides that NBC may reduce a station's network rate and compensation from network commercial programs to the extent that the station accepts from national advertisers "net payments less than those which NBC receives from the sale of your station to network advertisers for corresponding periods of time." This provision is intended to prevent outlet stations from securing such revenues as they might otherwise derive from the sale of time to advertisers for national spot business at rates lower than those set forth in the NBC rate card for national network business.

The network station rates of the outlets of CBS are set forth in the CBS rate card; but as a general rule they are not set out in the individual standard affiliation contracts. The rate for an evening hour is usually referred to as the "station rate." The rate for a daytime hour is derived by multiplying the evening hour rate by one-half, that for an hour after midnight by multiplying the station rate by one-third, and that for a Sunday afternoon hour by multiplying the station rate by two-thirds. A station does not have the power to change its network rate during the term of its affiliation contract. Although the standard affiliation contract is silent on the point, in certain of its contracts with its affiliates CBS has retained the power to change a station's network rates.

Mutual bills its advertisers for network programs at the rates established by the outlet stations themselves. Each outlet is free to change its rate at any time, and Mutual has no power to alter it.

C. NBC'S TWO NETWORKS—RED AND BLUE

The NBC "Red" and "Blue" networks are not separate and distinct entities with respect to the stations comprising them; the programs broadcast over them, their organization and personnel, or their property and equipment. Indeed, in certain respects there is not even the semblance of a distinction between the two networks.

As of September 1, 1938, 154 stations were licensed to or affiliated with NBC. Of these, 23 constituted the basic Red network and 24 the basic Blue network. Both these basic networks are located in the area from New England to Omaha north of the Mason and Dixon Line, which, although comprising only about one-third of the area of the United States, holds about two-thirds of its population.

Of the 107 affiliated stations not on either basic network, one was available only to the Red network and six were available only to the Blue network. Thus 23 basic and 1 supplementary station were associated only with the Red network; 24 basic and 6 supplementary stations were associated only with the Blue network. The remaining 100 NBC affiliates were supplementary to either the basic Red or the basic Blue network, at the option of advertisers. Individual stations within this group are often referred to as belonging to that network with which they are most frequently connected; but such designations may be erroneous for specific broadcasts.

NBC affiliation contracts do not specify with which network a station is to be associated, even in the case of stations actually on the basic Red and the basic Blue networks. Since the contracts omit all reference to the matter, NBC has the power to shift a station from the far more remunerative Red network to the less remunerative Blue network or vice versa at any time, regardless of the station's wishes.

With respect to programs as well as stations, the Red and Blue networks overlap. Where a program is carried over either the Red or the Blue basic network a distinction can be made. But those NBC sustaining programs which are broadcast over supplementary stations only are neither Red nor Blue.²⁶ NBC does not identify such programs, and there is in fact no way to label them.

The Red and Blue networks are not separate business enterprises, nor are they even two distinct operating divisions or departments within NBC. All its property, including studios, offices, and equipment, is equally and interchangeably available to both the Red and Blue networks. NBC announcers, musicians, talent, and engineers are used interchangeably; and, with two exceptions, no distinction is made in the duties of NBC personnel either in New York or in the field.

One exception is the sales department. A special division to promote Blue network sales was established in this department in 1938, and in December 1940, after the close of the committee hearings in this proceeding, the department itself was split into two sections, one for each network. At the same time, the program department was similarly split.

NBC does not allocate income or expenses between the Red and Blue networks; indeed, its treasurer testified that in view of the many ways in which operations intertwine, it would be practically impossible to allocate between them.

Additional evidence that the Red and Blue networks do not compete, and that NBC itself considers them integral parts of a single enterprise, is found in the company's discount policy. Discounts range from 21½ percent for advertisers who broadcast 13 weeks or more and whose gross billings total \$1,000 a week or more, to 25 percent for advertisers whose gross billings total \$1,200,000 a year or more. These discounts are based on combined billings of the two networks, and are granted regardless of whether one network is used or both.

²⁶ At the time of the committee hearings, NBC generally required that the basic Red network of 23 stations or the basic Blue network of 24 stations be purchased as a unit. There was the additional requirement in connection with the Red network facilities that in the evening between 8 p. m. and 10:30 p. m., an advertiser use a minimum of 50 stations. In the daytime, an advertiser was permitted to use less than all the basic Blue, but not less than the basic Red network. NBC supplementary stations were divided into 15 geographical groups largely for selling purposes, and an advertiser could add these stations to the basic networks in groups, and in some cases individually, to meet his merchandising problem.

CBS generally required an advertiser to purchase a minimum of 24 out of its basic network of 26 stations, but there were some exceptions to this rule during the daytime. The remaining stations affiliated with CBS, known as optional stations, were individually available to advertisers, with the exception of three groups which because of the long wire haul from the basic network, were available only in units consisting of all or a majority of the stations in each group.

Mutual generally required advertisers to use a minimum of only three stations, WOR, WGN, and WLW, but an advertiser could use only two of them if he assumed the expense of the wire connection between them. The remaining stations associated with Mutual were for the most part available at the option of advertisers.

VII. THE EFFECT OF NETWORK-AFFILIATE RELATIONS ON COMPETITION IN THE RADIOBROADCAST INDUSTRY

The Communications Act "recognizes that the field of broadcasting is one of free competition."¹ In certain other industries, such as railroads, telephones, and bituminous coal, where competition has not been effective in protecting the public interest, Congress has substituted detailed governmental control of rates, prices, finances, or other matters for the principle of free competition. But in regulating radio, "Congress intended to leave competition in the business of broadcasting where it found it."²

It has long been a basic hypothesis of the American system that competition in a free market best protects the public interest. This hypothesis, moreover, has been given the force of law throughout the entire field of interstate commerce. For more than half a century contracts and combinations in restraint of trade, and monopolization or attempted monopolization of interstate commerce, have been outlawed.³ The fundamental purpose of this legislation is "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade."⁴ The Sherman Act was enacted "to preserve the right of freedom to trade"⁵ and it is "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."⁶

The prohibitions of the Sherman Act apply to broadcasting.⁷ This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the absence of Congressional action exempting the industry from the antitrust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive

¹ *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 474.

² *Id.*, p. 475.

³ Secs. 1 and 2 of the act of July 2, 1890 (26 Stat. 209), commonly known as the Sherman Act. Of particular pertinence here is sec. 1 reading in part as follows: "Is hereby declared to be illegal. Every person who shall make any such contract . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

⁴ *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 512.

⁵ *United States v. Colgate & Co.*, 250 U. S. 300, 307.

⁶ *United States v. Trenton Pottery Co.*, 273 U. S. 392, 397.

⁷ This conclusion would be required even if the Communications Act were silent on the question. Sec. 313, however, expressly declares that the Federal antitrust laws are applicable to broadcasting. Sec. 313. "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of . . . radio apparatus and . . . to interstate or foreign radio communications." Sec. 3 (b). "Radio communication" . . . means the transmission by radio of . . . sounds of all kinds . . . Sec. 3 (c) "Broadcasting" means the dissemination of radio communications intended to be received by the public . . ."

of freedom of trade and competitive opportunity? Had we liberty in this regard we should require a very clear showing that such practices or restraints, because of conditions peculiar to the industry, promote the best interests of the listening public. In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is one of the elements to be considered in applying the statutory standard of "public interest, convenience, or necessity."

The nature of the radio spectrum is such that the number of broadcasting stations which can operate, and the power which they can utilize, is limited. The limitations imposed by physical factors thus largely bar the door to new enterprise and almost close this customary avenue of competition. NBC's brief, taking cognizance of this situation, states: "Free competition in any enterprise exists only when the field is open to everyone." The conclusion which NBC draws is that, because one of the usual concomitants of free competition is barred by physical factors, the members of the industry should be permitted to erect contractual barriers against any competition.

Precisely the opposite conclusion is required. An inherent restriction on competitive opportunity does not justify the superimposition of artificial restraints, but rather makes such restraints peculiarly onerous. Restrictive affiliation contracts might be tolerated if there were a dozen potential stations of comparable character in every city; they are intolerable when there are few cities which have (or can have) more than four stations of all kinds.

The very fact that in the broadcasting industry competition is restricted renders it all the more imperative that competition be not throttled by restrictive agreements. The words of Mr. Chief Justice Hughes, speaking for a unanimous Court in an important case, are applicable:⁸

The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired.

The Commission has recently had occasion to emphasize the public benefits of competition among radio stations:⁹

Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting.

The benefits of competition are equally clear in the field of network broadcasting. If national networks compete for station outlets on the basis of performance, there will be a direct incentive to improve and expand the programs, both sustaining and commercial, which they offer to the public. Likewise, if stations are not tied exclusively to a single national network over a long period of time and if stations compete for access to one or another national network—a matter often essential to profitable operation—each will be stimulated to improve the quality of the programs which it offers and hence its value as an outlet of a national network. This two-way competition—among net-

⁸ *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 660. See also *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U. S. 382.

⁹ *In re Spartanburg Advertising Co.*, Docket No. 5451, Jan. 9, 1940.

work organizations for station outlets and among stations for network affiliation—will insure the listening public a well-diversified, high quality program service.

Competition among stations will, however, necessarily remain a thing of shadow rather than of substance as long as conditions now prevailing are permitted to continue. As the facts set forth in this report demonstrate, profitable operation is often contingent upon a station's participation in national network broadcasting.¹⁰ NBC and CBS now dominate this field; their ownership and operation of important radio stations and their restrictive long-term contracts with other stations enable them to maintain indefinitely their present monopolistic position.¹¹ These conditions prevent their one existing competitor (Mutual) from seriously encroaching on their domain and practically foreclose the possibility of new competition; affiliated stations are treated as, and constitute, mere adjuncts of NBC and CBS.

NBC and CBS contend that the networks compete, and compete vigorously. Certainly there is a considerable degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the radiobroadcasting field, three different markets must be distinguished—the market in which networks and stations meet broadcast advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.

The restraints which we here consider have not been achieved in either of the two more common ways—through coalescence of the networks or through coalescence of the stations. Rather, they have been achieved through coalescence of some stations with one network and other stations with another. But the result is none the less to destroy the free market and to substitute for interplay of competitive forces a sort of monolithic rigidity. Stations bound by the usual 5-year exclusive contracts are not free to bargain with other networks for programs; networks are not free to bargain with those stations for time; and the door is closed against new networks. The result is to restrict the flow of programs from producers to listeners.

The present stratification in the field of network broadcasting is largely the result of the efforts of NBC and CBS to maintain their dominant position. The way in which the restraints in this field have

¹⁰ It has been shown that in 1928 the 310 stations not affiliated with any national network had a consolidated loss of about \$249,000, whereas the 350 remaining stations affiliated with some national network had a consolidated net operating income of about \$15,000,000 (*supra*, p. 33). Moreover, the consolidated net operating income of NBC and CBS and the 25 stations which they owned or operated equalled nearly half the consolidated net operating income of the entire industry (*supra*, p. 33).

¹¹ On the question of the dominant position of NBC and CBS, it has been shown that stations affiliated with either NBC or CBS represent over 85 percent of the total nighttime power of unlimited-time stations in this country (*supra*, p. 32). The ratio would not be materially altered by the inclusion of part-time stations or the use of daytime power ratings (*ibid.*). As to the effect of long-term contracts, restrictive contract provisions, and network ownership and operation of stations in stratifying the present setup in the industry see *infra*, pp. 51-79.

grown up is significant both in understanding their actual effect, and the intent with which they were adopted:

(1) CBS, almost from the first, tied up its stations with contracts which had the obvious and calculated effect of removing them from competition for 4- and 5-year periods.

(2) NBC did not adopt the restrictions during the early years. Indeed, in 1931, NBC's president asserted with justifiable pride that NBC "holds its network stations together only by the superiority of its network program service and by the demand of listeners for NBC network programs."¹² But when a new network, Mutual, entered the market, NBC abandoned its reliance upon program superiority and listener demand and removed its stations from competition through 5-year exclusive contracts modelled on the CBS pattern. Mutual thus remained the only adherent to the theory of a free station-network market until 1940.

(3) Thereupon a fourth network organization was projected: Transcontinental Broadcasting System. The stations on the NBC and CBS networks were inaccessible. Mutual stations, however, were open to advances from the new network, but there were few desirable stations with which Mutual could offset such losses. Mutual, like NBC earlier, promptly introduced restraints into its more important affiliation contracts.

(4) The upshot of the whole business is that today only a negligible proportion of the Nation's total nighttime broadcasting wattage is free to bargain in the network-station market.

NBC and CBS oppose the opening of the network-station market to competition. Although requested at the oral argument to present proposals for the furtherance of competition in the industry, no such proposals have been forthcoming. Instead, both urge that they deserve a kind of protected status because of their pioneering and their "first comer" position. NBC says that regulations of the type we propose would make it "easier to reap where NBC has sown." CBS says that "the fruits of enterprise must be preserved."

Clearly the Communications Act neither grants, nor authorizes the Commission to recognize, the claim to a vested right which is asserted. The grant of a station license confers upon the licensee no vested right to continuous operation.¹³ A network organization, which is superimposed upon station licensees, cannot give rise to rights superior to those upon which it itself rests.

A contention similar to that urged by NBC and CBS was squarely rejected in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470. It was there urged that the Commission, before authorizing construction of a new station, was required

¹² *In re National Broadcasting Co., Inc.*; Testimony of Merlin Hall Aylesworth, Docket No. 1221, June 15, 1931, p. 43.

¹³ Sec. 304 requires every applicant for a station license to waive "any claim to the use of any particular frequency or of the ether." Sec. 309 (b) (1) provides that the grant of a station license "shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof." That the grant of a station license confers no vested right is further conclusively shown by the authority given the Commission to refuse to renew a station license (sec. 309 (a)) and by the limitation of all station licenses to a maximum period of 3 years (sec. 307 (d)).

See also *American Bond & Mortgage Co. v. United States*, 52 F. (2d) 315 (C. C. A. 7, 1931), cert. den., 285 U. S. 538.

to determine whether such action would cause economic loss to an existing licensed station. The Court, in holding that the Commission was not required to give such loss "separate and independent" consideration, said (p. 476):

If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives. * * [Italics added.]

We are not aware that existing networks entered the field believing that they had exclusive franchises; nor are we aware that the networks have accepted the duties customarily associated with such franchises. So far as "preserving the fruits of enterprise" is concerned, we note that NBC and CBS are not immature enterprises which, having invested heavily in preliminary exploration, are now about to enjoy the fruits of their investment. Both have reaped, and reaped richly, almost since the time of their foundation. When the tremendous returns on investment which each has received, amounting in 1938 alone to 80 percent of the investment in tangible property in the case of NBC and 71 percent in the case of CBS, are pointed out, both defend such rates of return by insisting that networks are service enterprises in which profits are not a function of investment. They can hardly argue simultaneously that their investment, already returned many times over, is an essential element in radiobroadcasting which deserves to be protected by monopolistic rights.

The established position of NBC and CBS in the industry is a reason against, rather than for, permitting them to consolidate that position by restrictive covenants or by ownership or operation of stations. Their financial resources, diversified activities, trade contacts, and established listener goodwill¹⁴ impose handicaps, difficult enough to overcome, upon any rival in the field of network operation.

Mutual states that there should be competition in the broadcasting field, but proposes, for example, that exclusivity be abolished and option time restricted only with respect to those stations serving cities with three or fewer comparable full-time stations. The effect of Mutual's proposals would be to open up the field to competition among the existing networks; but these proposals would buttress their positions vis-à-vis all others. Such a result, while no doubt welcome to Mutual, would hardly ensure the degree of competition which the Communications Act envisions and the public interest requires.

A constantly improving service to the public requires that all the competitive elements within the industry should be preserved. The door of opportunity must be kept open for new networks. Competition among networks, among stations, and between stations and networks, all of which profoundly affect station service, must be set free from artificial restraints. It is not in the public interest for any licensee station to make arrangements which tend to close that door or restrain that competition. Pursuant to the mandate of Congress that it grant licenses and renewals only to stations operating in the public interest, this Commission must refuse further to license stations which persist in these practices.

¹⁴ See *supra*, pp. 30 et seq.

A. EXCLUSIVE AFFILIATION

1. Licensee allowed to broadcast programs of only one network

NBC and CBS, by contractual arrangements with their affiliates, prevent the great majority of them from broadcasting programs of any other national network. This restriction hinders the development of other national networks. The evidence is convincing that the purpose, as well as the effect, of exclusive affiliation, is to prevent the growth of other national networks.

Since its first contract in 1927, CBS has had an exclusive affiliation clause designed to obstruct what it calls "wildcat networks." NBC, however, did not adopt its exclusivity clause until 1936, after certain of its affiliates had begun to broadcast Mutual programs. The NBC vice president in charge of station relations testified at the committee hearings:

At the very outset, this was something which we had assumed, this exclusivity of arrangements between the network and the station. It was something that we didn't think had to be put into writing and it was not until about 1936 that it did become phrased in this particular way, and that was only due to the fact that these exceptions were beginning to grow up where there was not that recognition by the stations of the viewpoint which I have expressed (Hedges, Tr. 1839).

NBC's assumption apparently had not been shared by its affiliates; for a substantial number of them had, in fact, carried Mutual programs. When the rise of Mutual posed the question of exclusivity as a practical problem for the first time, NBC countered with the present exclusivity clause. It is a fair inference that NBC's desire to entrench its position and to hinder the growth and development of a new national network played an important part in the decision to incorporate an exclusivity clause in the standard NBC affiliation contract.

But whatever the purpose of the exclusivity clause, there is no doubt as to its effect. At the present time there are 45 cities with a population of more than 50,000 served by NBC or CBS or both to which Mutual cannot obtain any access whatever. In over 20 more, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte, and Harrisburg, it can obtain only limited access to facilities. The difficulties facing a new network under these circumstances would be well-nigh insurmountable.

Of the 92 cities of more than 100,000 population, less than 50 have 3 or more full-time stations, even including locals, and less than 30 have 4 or more. Since a national network must have outlets in the more important markets of the country, it is readily apparent that exclusive network affiliation contracts severely limit the number of national networks which may do business.

But figures on the limited number of stations outside the NBC and CBS domain do not fully show the extent of their present dominance. NBC and CBS have, by their exclusive contracts, tied up the largest stations in the most desirable markets. This is evidenced by the fact that of the 30 clear-channel stations in 1938, there were 28 licensed to or affiliated with NBC or CBS; and this dominance of the clear channels is typical of NBC and CBS dominance with respect to high-power regional stations as well. Thus even where stations are available to

a new network, they are, with few exceptions, locals or low-power regionals not able to compete effectively with the superior stations under exclusive contract to NBC and CBS.

As previously noted, there are natural obstacles making the formation and operation of a new network difficult enough at best; the existence and enforcement of exclusive contracts make it practically impossible. Obstacles should not thus be heaped one upon the other. Exclusive contracts, which foreclose the possibility of new networks, deprive the public of the improvement in station program content which could reasonably be expected to flow from competition by new national networks.

In the many areas where all stations are under exclusive contract to NBC or CBS, the public is deprived of the opportunity to hear Mutual programs. Restraints having this effect are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. The Mutual programs which the stations would broadcast if permitted freedom of choice are, in these areas, withheld from the listening public. In addition, the very fact that Mutual is denied access to important markets immeasurably restricts its ability to grow and to improve program quality.

Not only is regular Mutual program service banned from large areas, but even individual programs of unusual interest are kept off the air. A concrete example of the manner in which exclusivity clauses operate against the public interest may be seen in the broadcasting of the World Series baseball games of October 1939. Mutual obtained exclusive privileges from the baseball authorities for the broadcasting of the series with the Gillette Co. as commercial sponsor. Thereupon it attempted to obtain time from various stations, including stations which were then under exclusive contract to NBC and CBS. CBS and NBC immediately called upon their outlet stations to respect the exclusive provisions of their contracts. Disregard of this reminder would have jeopardized a station's rights under the contracts. This prevented certain licensees from accepting a program for which they believed there was public demand and which they thought would be in the public interest.¹⁵ It also deprived the advertiser of network advertising service in some areas, and prevented the licensee from receiving income which could have been obtained from acceptance of the program series. As a result, thousands of potential listeners failed to hear the World Series of 1939.¹⁶

¹⁵ In a footnote to its supplementary brief, CBS contends that "Mutual was the real party at fault, if any existed. Columbia offered to have its stations carry the broadcast, the sole condition being that it not be forced to advertise its competitor, Mutual" [Italics supplied.] Since it is patent that compliance with this condition was impracticable, the offer was a mere gesture. Moreover, this CBS argument assumes that the affiliated stations in some way belong to CBS. The position seems to be that when an affiliate broadcasts a Mutual program, CBS is advertising Mutual. This confuses a broadcast by an affiliate of CBS with a CBS network broadcast. The network has wide latitude to advertise or refrain from advertising anything it pleases on its network programs. But it is the stations which are licensed to utilize the radio facility in the public interest, and they should be free to accept or reject programs which are in the public interest, whether or not CBS approves.

¹⁶ Mutual refused to allow other stations within the territory of Mutual outlets to broadcast the program. This was because of its practice of respecting the territorial exclusivity of its affiliates. *Supra*, p. 36.

Only strong and compelling reasons would justify contractual arrangements which have the results we have described. We turn, therefore, to a consideration of the arguments proffered by NBC and CBS in support of their contention that the exclusivity clauses are necessary to the proper operation of network broadcasting.

NBC seeks to justify exclusivity on the ground that it eliminates "confusion" on the part of the radio audience concerning the affiliation of any particular station and enables the listening audience to know where to turn for the programs of any given network. But it is a well-known fact that audiences are keenly aware of the quality and merit of particular programs and follow their favorite programs from station to station. Numerous ratings of programs show that the power of programs to attract listeners varies widely among programs broadcast over the same station. Indeed, the whole effort to improve programs by spending large sums on talent and material is founded upon the theory that good programs attract large audiences. NBC's chief statistician testified that listening audiences do not stay tuned to a particular station but shift around to hear certain programs:

It [a survey of listening audiences] merely shows that there are wide shifts of the audience from station to station, depending on programs; that the audience does not stay with any particular station throughout the morning or afternoon; in this case only the morning. There are wide shifts of programs as listening increases and decreases, depending upon the programs that happen to be on. There is no constant level of listening, nor constant level of listening to any one station (Beville, Tr. 418-19).

NBC's fear of listener confusion is apparently not shared by NBC's chief statistician.

A second argument advanced by NBC to justify exclusivity is that network broadcasting is a joint venture in which NBC spends large sums on sustaining programs to build up goodwill for station and network alike. It is urged that it would be unfair to NBC for an affiliated station, by disposing of its time to another network, to trade on the goodwill which has been built up through the broadcasting of NBC programs, and that it would remove the incentive for furnishing good sustaining programs to its affiliates.¹⁷

For various reasons this line of argument also fails to persuade. If we assume that NBC's incentive for supplying good sustaining programs to affiliates is its desire to build up a listening audience for NBC commercial programs, this does not aid its argument. For

¹⁷ "In effect, network broadcasting is a joint enterprise. It is a joint enterprise necessarily because the National Broadcasting Co. has no voice, no articulation without the transmission of its programs by its stations.

Being a joint enterprise, it creates a goodwill which is enjoyed by both the stations and the network, and for one party to be faithless to the other to the extent that it barter the goodwill which has been built through the broadcasting of NBC programs by disposing of its time to another network is unfair to the National Broadcasting Co. as it would be unfair to any other network having similar affiliations and providing a similar service to its audience, and to the station.

There would be no incentive for the National Broadcasting Co. to continue to serve its stations with such a vast amount of sustaining service if it were reduced to a status of a mere time brokerage, as it would be in the case that a station could play fast and loose with its affiliations between networks" (Hedges, Tr. 1853-54).

Obviously, if a network spent money, as we are doing, to develop the popularity of an individual broadcasting station in some territory, if we gave them sustaining programs and they attracted a listening audience and they built up circulation, and then some other organization came along that did none of these things, but just had a commercial program, and asked that broadcasting station to take their program and put behind it the goodwill and the circulation and the pioneering that had been done by whoever built that station up, of course, that somebody would have a temporary advantage, but American broadcasting would have a loss" (Sarnoff, Tr. 8521).

this would only give NBC a legitimate interest in seeing that the station did not broadcast poor programs during its non-NBC time. It is hardly to be presumed and indeed NBC does not contend, that a station given free rein would choose a program from another network less attractive than the program which would otherwise have been broadcast.

The evidence introduced at the committee hearings leads to the conclusion that the elimination of exclusivity will not bring any deterioration in the overall quality of network sustaining programs. Indeed, as an historical matter, NBC supplied its affiliates with sustaining programs for some 10 years before it adopted exclusivity. No attempt was made to show that the introduction of exclusivity improved in any way the quality of the sustaining programs furnished by NBC to its outlets.

Moreover, sustaining programs are not a gratuity; they are sold like any other service.¹⁸ From 1926, when NBC first began broadcasting, until 1935, a period of about 9 years, NBC charged its affiliates for its sustaining programs. CBS during most of the first year of operation also charged affiliates for sustaining programs. But after NBC and CBS abandoned direct payment for sustaining programs, affiliated stations were still required to furnish a valuable *quid pro quo* for these programs. The changed method, which is now in effect, provides that affiliated stations receive no compensation for a specified number of hours of network commercial programs, and reduced compensation for certain additional hours. To the extent of these hours, the network is paid by advertisers but does not have to share its receipts with station licensees. In short, stations pay handsomely for sustaining service, just as they always have done in the past. If NBC and CBS do not supply adequate sustaining programs, we cannot believe that others will not be ready and willing to take their place once the field is opened to them.

As we point out elsewhere in this chapter, the public interest will be better served if networks compete for outlet stations. Such competition undoubtedly will encourage the networks to supply sustaining programs whose good quality will induce stations to carry their commercial programs.

We are driven to the conclusion that the real purpose and function of NBC's exclusivity is to prevent competing networks from making any use of the audiences of its affiliates. But those audiences are not NBC's to use or withhold as it sees fit, even though NBC claims that they were attracted in part by virtue of its sustaining programs. The licensee must remain free to use its time and facilities, when they are not being utilized by NBC, in any way that it sees fit in the public interest. No station should be permitted to enter into an exclusive agreement which prevents it from offering the public outstanding programs of any other network or hinders the entrance of a newcomer in the field of network broadcasting.

Finally, it is broadly argued by NBC that the elimination of exclusivity will destroy the entire fabric of network broadcasting. "Destroy that provision," stated the chairman of the board of NBC, "and you will have destroyed the American system of network broadcasting." These forebodings are in strange contrast to the words of a

¹⁸ *Supra*, pp. 37-44.

former president of NBC who testified that NBC "holds its network stations together only by the superiority of its network program service and by the demand of listeners for NBC network programs".¹⁸

The testimony of NBC's chairman must also be read in the light of his statement that he did not believe in competition between networks for stations. He testified: "The competition, it seems to me, is in the program end, rather than in the facility end, and this is as it should be." We cannot agree that so essential a factor in the operation of a network—the number and character of the affiliated stations which are its customers—should be removed from the field of competition. We cannot agree that the field should be forever limited to the present incumbents.

The president of CBS contends that the freedom of an affiliate to broadcast the programs of any network might be a stimulus for what he called "wildcat" networks operated by "opportunists who would have no permanent investment".

If Columbia continued to have a call on station time but didn't have the exclusivity clause, the station could take the program from any network and that might be a stimulus for the so-called wildcat network.

I believe that if the present system were disturbed there would develop a class of opportunists who would have no permanent investment, who might have their office in their hat, who would be competing for temporary affiliations, with the result that the important elements of responsibility and reliability and high standards would be seriously impaired to the detriment of the public (Paley, Tr. 3464, 3465).

Obviously, CBS' exclusivity clause, assertedly designed to prevent "wildcat" networks, would as effectively preclude the competition of responsible networks. Indeed, CBS has a far greater stake in precluding the establishment of responsible networks which could offer real and continued competition to it than it has in barring the door to newcomers lacking in reliability. Their deficiency in this respect would bring their quick exit.

It is interesting to note that in another connection, in arguing that the rate of return upon its invested capital was not too high, CBS took a very different position on the importance of capital in network broadcasting. The brief states: "Broadcasting, as any other advertising enterprise, is a service business, the value of which is not dependent upon or determined by the value of the tangible assets devoted to the business."

The president of CBS also testified that there was no reason for organizing another network because a new network could not do any better than CBS was doing:

I cannot see any advantage in organizing something new which I do not think would have any particular advantages or could do a particular job in any better fashion than we can do it. I don't think the public interest is involved just because two people happen to supply a service as against having one person supply an adequate service, especially since by having the one person supply the adequate service we can have greater solidity and permanence of the very thing he is trying to build up (Paley, Tr. 3556).

This attempted justification of exclusivity, however, fails to take into account the function of competition in our economy. CBS programs may be good; they are not perfect. CBS has not been granted an exclusive franchise to engage in network broadcasting; it has no

¹⁸ *Supra*, p. 49.

right to exclude others from the field on the ground that it is already furnishing adequate service to the public, or on any other ground. Competition is in the public interest not because the particular service offered by a new unit is better than the existing service, but because competition is the incentive for both the old and the new to develop better services.

Both large network organizations also contend that, were it not for exclusivity, the station in each community with the best coverage would get all the superior programs; the less favored stations would get only the leftovers. As a result, they argue, existing inequalities in facilities would be accentuated and effective competition by the small stations rendered impossible. This solicitude for the smaller station is not easy to reconcile with the NBC and CBS policy of tying up the best possible stations in a city and refusing their programs to the smaller stations. The contention comes with little grace, too, from network organizations whose restrictive practices have tended to prevent the rise of new networks which might supply these less favored stations with programs.

Nor do we believe that the elimination of exclusivity will have the predicted results. On the contrary, its elimination should lead to an increased number of networks and, consequently, a larger supply of available network programs and a wider latitude for all stations in obtaining network programs. Then, too, there should be a gain in quality as well as quantity as a result of increased competition among networks for the time of outlet stations. Not only the more powerful stations, but those with less desirable facilities, and the public as well, will benefit.

From a practical standpoint, this contention by the networks overlooks the highly important matter of cost of time. The large stations in each city cannot monopolize the best commercial programs unless the advertising sponsors are willing to pay the higher rates charged by such stations. A great variety of factors will affect the sponsors' decisions on this matter. To be sure, if a sponsor desires effective coverage of all his best markets on a national scale, he will not be content with a network of low-power stations; as we have seen, the fact that NBC and CBS have tied up the best facilities in every important market has been the main obstacle to other networks. But in determining precisely how many high-powered stations should be purchased, each sponsor will want to consider, in the light of his radio advertising budget, such matters as the geographical location of each station in relation to his merchandising problem, its ratio of urban, suburban, and rural listeners, the income status of its audience, and numerous other such matters. Facilities highly desirable for one advertiser may be wasteful for others.

A glance at the network rates for these big stations is sufficient to show the importance of the cost factor. In Louisville, Ky., for example, there are four stations: a 50-kilowatt clear-channel station affiliated with CBS, a 5-kilowatt regional station affiliated with NBC's Red network, and two low-powered local stations, one of which is affiliated with Mutual and the other with NBC's Blue network. The full hourly rate for the local station is, in each case, about \$120; for the regional station, \$200; and for the big station, \$475. Clearly, the big station will not be able to draw commercial programs away from the regional station unless the sponsor is willing to pay well over

twice as much for the privilege. An advertiser who has been utilizing one of the local stations would have to quadruple his payments.

Applying the same test on the basis of some 25 cities suitable for a "basic" network, and of a 52-week program series, the results speak even more eloquently. If, in each of those cities, the program series were to be furnished to the most powerful station, the cost to an advertiser would apparently exceed by roughly \$50,000 the cost of using the CBS or the NBC Red networks. If, in addition, the advertiser wished to cover the dozen or so cities which have 50-kilowatt stations but which are not included in any basic network, the advertiser would pay, for a 52-week series, roughly \$37,000 more if he used the 50-kilowatt station in each city than if he used the CBS or NBC Red network stations in those cities.

Perhaps, in some cases, an advertiser will be willing to pay the additional amounts required to secure an unusual number of large stations for his program. But it is also likely that, in other cases, advertisers will seek to lower their costs by using fewer high-powered stations. The elimination of exclusivity, accordingly, seems likely to introduce a greater amount of flexibility into the situation by giving advertisers a wider range of choice with respect to rates and coverage.

Finally, if the dominant stations should take commercial programs during the more desirable broadcasting hours to the exclusion of public service programs, they would undermine their own position. Degeneration in the quality and variety of their programs might cause them to lose listeners, and bring about a weakening of their competitive commercial situation. Furthermore, stations enjoying the benefits of a public license have an obligation to render the public its due in the form of the best program service that the capital and intelligence of the licensee permits. This obligation is particularly clear where the license authorizes the use of high power, with the concomitant benefits of coverage, opportunity for profit, and exclusion of others from the spectrum. Accordingly, such tactics would render the dominant stations vulnerable to applications for their facilities by other stations or persons willing to furnish a better-rounded service.

Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry.

2. Network allowed to send programs to only one station

Hitherto we have dealt only with exclusivity of affiliation which obligates an outlet to broadcast the programs of only one national network. The correlative of this exclusivity is territorial exclusivity, whereby the network agrees not to transmit its programs to any other station in the "territory" of an existing affiliate.

The NBC vice president in charge of station relations testified that fidelity of the network to the station as well as of the station to the network is inherent in the American system of network broadcasting. He testified further that about the same principles apply to territorial exclusivity as to exclusivity of affiliation. He added, however, that

NBC had granted territorial exclusivity as a matter of contract right in only a few cases. Such exclusivity is granted to a station most reluctantly by NBC, and only after what he characterized as a "knock-down and drag-out fight," because, according to the witness, "the less restrictions that we have upon us are always to be preferred." There is no evidence in the record, however, that NBC ever sends its programs to other stations in the same area as its outlets, and the testimony of NBC's chairman would indicate that it does not.¹⁹

CBS, on the other hand, regards fidelity of the network to the station more rigorously. In the very provision of its affiliation contract which makes its affiliates exclusive CBS outlets, the affiliate is granted protection against the competition of CBS programs from other stations:

Columbia will continue the station as the exclusive Columbia outlet in the city in which the station is located and will so publicize the station, and will not furnish its exclusive network programs to any other station in the city, except in case of public emergency.

Mutual grants its associated stations territorial exclusivity. At the time of the committee hearings, five organizations, including the Don Lee regional network, were given this protection against competition in their affiliation contracts; and, as a matter of practice, Mutual affords similar protection to its other outlets.

The question of territorial exclusivity is an important one because, among other reasons, network affiliates take only some of the programs offered them by the networks. With few exceptions,²⁰ stations may select freely from among the sustaining programs of their respective networks those that they want to broadcast and reject the others. An affiliate may reject a sustaining program because of its quality, or because it does not fit the program structure for a given day, or for any reason whatsoever. The affiliate's right to reject network sustaining programs is not restricted in the same way as its right to reject network commercial programs.²¹

Territorial exclusivity arrangements are important from the point of view of over-all program structure. To be sure, usually it would be wasteful duplication of service for a network simultaneously to send identical programs to stations whose service areas approximately coincide. If the only effect of territorial exclusivity were to prevent duplication, no fault could be found. But exclusivity goes much further; it protects the affiliate from the competition of another station in the same area which may wish to use network programs not carried by the affiliate.

Under territorial exclusivity, programs rejected by affiliates, sustaining or commercial, may not be offered by the network to other stations in the service area of the affiliate which rejects the program. An example of the adverse effect this may have upon the public is given in a brief filed August 7, 1940, by station WBNY at Buffalo, N. Y.²²

¹⁹ In answer to the question: "Do you think it equally sound to say that the network ought to obligate itself to the station to render service exclusively to that station in the area which is served by that station?", the chairman of the board of directors of NBC said: "I think so, except where it is known to be rendering service to another station, where it is known in advance that it does so; but, by and large, I should think that that obligation ought to be reciprocal; yes." (Sarnoff, Tr. 8522).

²⁰ *Supra*, p. 40.

²¹ *Supra*, p. 38.

²² The facts set forth by WBNY were not controverted by any party at the oral argument or in the supplementary briefs.

WBNY related that Mutual outlets in Buffalo rejected a sustaining program series known as "The American Forum of the Air," but that its efforts to obtain this program were futile. Consequently, this worth-while program was not broadcast to the Buffalo area despite the desire of WBNY to carry it.

It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference.

This is not to say, of course, that all programs not carried by an affiliate must be offered to all other nearby stations. Nor need sustaining programs be offered free of charge. Suitable arrangements for compensating networks for sustaining programs and stations for commercial programs will be arrived at between the parties. The crucial point is that it is not in the public interest for a station licensee to enter into an arrangement with a network to preclude other stations in the area from broadcasting network programs which it rejects.

B. LONG-TERM AFFILIATION CONTRACTS

Another way in which the national networks obstruct the growth of new networks is by means of long-term contracts with their affiliated stations.

The standard NBC affiliation contract is for a term of 5 years with the right granted to NBC, but not to the station, to terminate the contract upon a year's notice. The record in this proceeding shows that the purpose of the 5-year term is to prevent the affiliates from becoming affiliated with another national network. Perhaps the most conclusive evidence is the fact that the term of the NBC contracts was changed from 1 year to 5 in 1936, soon after, Mutual was launched. According to the NBC vice president in charge of stations relations, NBC adopted the 5-year plan because competitors were taking away its stations and NBC wanted to keep its network intact:

Our present contracts run up to 5 years. The reason for that was simply this. With a contract of this nature, which I have just described, where a station may cancel upon a year's notice, we were exposing ourselves to our competition. Our competition, so we were informed, were perfectly willing to sit down and negotiate contracts with such of our affiliates as they desired and bide their time for the year to elapse before they could take over the stations.

It seemed rather poor business for us to leave ourselves in such a vulnerable position and for that reason we decided to further stabilize our business and to stabilize the network business not only for our own benefit but for the benefit of all those affiliates associated with us, by retaining the network in as intact order as was possible subject, of course, to the individualities that were involved and whose individual determinations in each case might induce further change within the network. For that reason, we adopted a 5-year plan (Hedges, Tr. 1819-20).

Furthermore, the change that occurred in 1936 affected only the obligation of the station, but not that of NBC. NBC retained the right, upon 12 months' notice, to terminate the contract with or without cause. NBC's contractual obligation was thus limited to a single year. There was no effort to stabilize the network-affiliate relation-

ship on a 5-year basis. The new contract was clearly an effort to tie up the station for 5 years, if the network wanted to utilize it that long.

There was some testimony and argument to the effect that long-term contracts are indispensable to stable and efficient network operations, because NBC itself has certain long-term commitments. The argument is made in NBC's original brief that it entered into leases for studio space and invested large sums in equipment on the strength of these 5-year contracts, which would not have been done without contractual assurance that these studios would be useful for more than 1 year.

Analysis of the evidence shows that this contention is in the nature of an afterthought. From 1927 to 1938 NBC built 17 studio plants at a total cost of \$7,719,200. Eleven of these seventeen studio plants, built at a cost of \$5,519,700, or 71 percent of the total, were completed prior to 1936, while the term of the NBC affiliation contract was still only 1 year.

Nor is NBC's argument as to the need for long-term contracts consistent with its declared policy of "flexibility" in its dealings with the stations. NBC may decrease the network station rate of any one of its affiliates upon 90 days' notice if at the same time it reduces the rates of a majority of its affiliates; it may increase the network station rates of its affiliates; and it may terminate any of its affiliation contracts on 12 months' notice. NBC insists upon those rights on the ground that the network business is dynamic and ever changing, and that NBC must be in a flexible position at all times:

This clause gives to NBC a degree of flexibility in respect to rates which is absolutely essential to meet any possible general reduction which might be made by other advertising media.

It must be remembered that the depression, recession or whatever you want to call it, is still upon business generally although there has been some upturn. Nevertheless, when you are with stations for a period so long as 5 years, there is no telling what may happen and if a depression were to suddenly come about it might be very necessary in order to keep the network functioning as a national advertising medium to reduce those rates to meet the competition of national magazines or other media which advertisers may employ for national advertising purposes (Hedges, Tr. 1824).

However, NBC failed to give any reason why the network-affiliate relationship should be dynamic for the purpose of giving NBC flexibility but static for the purpose of binding the affiliates for long periods of time.

NBC also contends that network-outlet contracts for a single year are impractical for the reason that a national advertiser's use of broadcasting is quite different from a spot announcement which a local merchant may buy in an effort to find immediate customers. It is pointed out that the most important return which any national advertiser secures from his expenditures in broadcasting is the goodwill of listeners resulting from attractive programs over the same stations for a period of years. It is urged that national advertisers must have some reasonable assurance that the same stations will be available for several years, or they may be expected to take their advertising to other media which can assure continuity.

The evidence in the record fails to support this contention. The NBC vice president in charge of sales testified that NBC does not make any commitments with advertisers for a period longer than 1 year.

because it is difficult in the broadcasting business to determine what the situation will be after a year:

We do not make commitments beyond 52 weeks because it is pretty difficult in this business to determine exactly what the situation would be after a year and we do not want to commit ourselves beyond a year. We don't know what new regulations may develop; what we may find it necessary to do. This radio business has changed pretty rapidly since it started, and we always want to be in the flexible position, as far as we are concerned, so that we can make any necessary moves, and we don't want to be cramped by longer than 52-week contracts (Witmer, Tr. 2166-2167).

This testimony shows conclusively that NBC does not give advertisers any assurance that they may use its facilities beyond a period of 1 year.

To summarize, NBC does not believe that there should be competition between networks for outlet stations, and adopted the 5-year affiliation contract for the purpose of precluding such competition. NBC's chairman testified that, if contracts with affiliates were for 1 year instead of 5, the stability of networks would be seriously affected; for there would be competition between the networks for stations. He said that the competition was, and should be, in programs rather than in facilities.²³

The term of the standard CBS affiliation contract, like that of the NBC contract, is for 5 years. CBS, but not the station, may terminate it upon 1 year's notice. As evidence of a viewpoint similar to that of NBC, note should be taken of the following testimony of the CBS vice president in charge of station relations:

It has been my personal experience that a length of time up to 5 years has been the practical period of time (for term of affiliation contracts) because should there be a year-to-year situation you would be continually renewing and renegotiating and renewing contracts, and you would also be *vulnerable from a competitive standpoint* (Akerberg, Tr. 3719). [Italics supplied.]

The long-term contracts of CBS and NBC were intended to, and do, prevent any real competition in the network-station market. The public is thus deprived not only of the advantages that might flow from the establishment and development of new networks, but it also loses the benefits of competition between existing networks for the better outlets.

Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract.

²³ Q. "If your contracts with your affiliated stations were for, say, a year instead of 5 or more years, do you think that that would materially affect the stability of the networks?"

A. Yes; I think not only materially but seriously.

Q. "Well, now, just how? When the contracts expire I suppose that there would be competition with the other networks for that affiliation?"

A. "There would be competition for the stations, competition between the networks, and since a network, in order to exist, must have certain stations on its network, the local stations would then deal with the highest bidder, and other questions would become subsidiary to that, and there would be a continuous battle back and forth to obtain the more desirable stations on these networks. That would throw the whole structure into a state of confusion. A year does not mean very much. The listener also has become accustomed to dialing to his favorite station on a certain network, and he would continually find that he would have to dial elsewhere. The competition, it seems to me, is in the program end, rather than in the facility end, and this is as it should be" (Sarnoff, Tr. 8542). [Italics supplied.]

The option of CBS and NBC to terminate the contract upon a year's notice, without a correlative option in the affiliate; gives the network the whip hand over the outlet. Such an arrangement is lacking in mutuality.

In general, Mutual's contracts with its affiliated stations permit both parties to cancel their affiliations after the first year, upon a year's notice. The contracts between Mutual and its seven stockholders, however, are for a 5-year period, but give to those stockholders, rather than Mutual, the privilege of cancellation upon a year's notice at any time after the first 2 years.

We conclude that long-term network affiliation contracts remove the choice outlets from the network-station market and thus prevent the establishment and development of new networks; that, under such contracts, stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action.

We are supported in this view by the fact that Congress has foreclosed vested rights in the field of radio broadcasting. Congress also provided that no radio station should be licensed for more than 3 years; licenses issued by the Commission in fact run for only 1 year. While the network-outlet contract is necessarily contingent upon the Commission's granting license renewals, we nevertheless conclude that, as a matter of policy, no radio station should even partially or contingently bind over its facility to a network for as long a period as 5 years.

With respect to the maximum term of the contract, no showing has been made that there is any business need for an affiliation contract longer than 1 year. On the contrary, competition will be strengthened if opportunity is provided for annual readjustments on the basis of comparative showings of networks and stations. We conclude, therefore, that station licensees will best serve the public interest if they refrain from entering into such contracts for periods in excess of 1 year and hold themselves free to negotiate with networks annually.

C. NETWORK OPTIONAL TIME

At the time of the committee hearings, both NBC and CBS had network optional time provisions in the affiliation contracts with their outlet stations. Mutual entered into similar arrangements with its 7 stockholders early in 1940, covering some 50 stations owned or operated by the stockholders or affiliated with their regional networks.

Upon 28 days' notice NBC may call upon its outlet stations to carry a commercial program during any of the hours specified as network optional time. This covered the entire broadcast day for 29 outlets of NBC in the far west and, for substantially all the rest of its affiliated stations, 8 1/2 specified hours on week days and 8 specified hours on Sundays. Three and a half evening hours are included each day, and 4 evening hours on Sunday. The evening hours between 8 and 11, which are included within the NBC option, are the most profitable and valuable of the broadcast day.

In spite of the fact that it optioned such substantial periods of time, in 1938 NBC used for network commercial programs only 58.1 percent of the optioned time of stations on the basic Red network, and only 19.4 percent on the basic Blue network. The percentages, of course, would be far smaller if figures for all the supplementary stations were included, because the basic stations, located in the important markets and usually available to advertisers only as a group, carry far more network commercial programs than the supplementary stations.

NBC affiliates may utilize the optioned time only subject to 28 days' notice that NBC wants that time. This limits severely their ability to sell their own time. The NBC vice president in charge of sales testified that 13 weeks is the minimum time necessary for an advertising campaign to take hold:

We feel in radio a new advertiser is likely not to feel the benefits of his radio advertising until he has been on the air a considerable length of time. It depends upon the circumstances. It may be necessary for him to be on 26 weeks before he begins to get a real lift from his radio advertising. He may be on only a matter of a few weeks; one program may give him a tremendous reaction. It all depends upon the circumstances, but by and large we feel that 13 weeks of radio advertising is about the minimum from which an advertiser can expect to get results (Witmer, Tr. 2165-2166).

To the extent that, and in the field where this is true, the provision for option time would make it impossible for the stations themselves to make any effective contracts for advertising programs.

To be sure, it is less difficult to shift the time of a local commercial program involving only one station than that of a network commercial program. Nevertheless, shifting a local commercial program may seriously interfere with the efforts of a sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service.

NBC's time options likewise affect the ability to serve the public interest of those few of its affiliated stations (not subject to an exclusivity clause) which are affiliated also with Mutual. As of January 17, 1939, 25 NBC stations also served as outlets of Mutual. NBC's contractual right to utilize the time of these stations on 28 days' notice gives it the whip-hand over any other network broadcasting over these stations. Mutual's general manager gave testimony as to how this works out:

For an example, a program would be developed to go on three radio stations at a particular hour. It would become a popular program; they would want to expand the program; we would find ourselves in the position of say, [sic] "If you desire to expand the program, we must provide certain facilities, subject to 28 days' notice." Some one else in direct solicitation of the same thing said, "We can supply either a different facility, either a better facility, or in many instances, the same facility where we can guarantee the time to you." We lost through our faults, we lost Lucky Strike. We could go through a number of specific things which we lost in the development.

Now in analyzing that and while we realize that we are going to continue to grow and do the things which aggressive operation is expected to do, you do reach a certain point where people begin to understand the relative function which you can perform. As of today the function that we can perform is understood to be partially restrictive (Weber, Tr. 5193-94).

This uncertainty in the availability of NBC's affiliates to other networks places a serious obstacle in the way of the development of new

networks. Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the important stations are subject to withdrawal upon order of a dominant network. Stability for NBC cannot be justified if attained at the cost of instability on the part of NBC's competitors and of their consequent inability to expand and provide the radio listening audience with effective program service.

NBC's optioning of time has an even more adverse effect upon the broadcasting of national spot commercial programs by means of transcriptions. The NBC exclusivity clause does not apply to transcription broadcasts, but the optional-time provision does. The fact that transcription broadcasts, which fall within the periods optioned to NBC, can only be scheduled subject to a 28-day call by NBC, is a serious obstacle to obtaining sponsors for such programs. Like sponsors of other programs, they endeavor to build up regular listening audiences and this takes longer than 4 weeks. By keeping a 4-week call on the best time of its affiliates, NBC renders transcription programs a less effective competitor.

The CBS optional-time provision restricts the outlet stations even more than does that of NBC. While NBC optional time for most of its outlets covers 8 or 8½ specified hours per day, CBS optional time covers the entire broadcast day. Upon 28 days' notice CBS may call upon its outlet stations to carry a network commercial program at any hour.²⁴ This has the same restrictive effect upon other types of programs broadcast by CBS affiliates as does the NBC optional-time provision. Notwithstanding these disadvantages from the optioning by CBS of all the time of its outlets, CBS during 1938, used for commercial programs only 39 percent of the optioned time of its basic network stations.

Only five CBS affiliates were, as of January 1939, outlets of Mutual as well. The optioning of time by CBS restricts the broadcasting of Mutual programs over these five stations. Upon the elimination of the CBS exclusivity clause, the restrictive effect of the present optional-time provision upon the development of new networks would be apparent at once. Indeed, as a practical matter, it is not unlikely that, even if exclusivity as such were eliminated, the present network optional-time provisions would, unless likewise eliminated, perpetuate exclusivity.

From the time of its organization in 1934 until 1940, Mutual did not option any of the time of its associated stations. Early in 1940, however, Mutual entered into optional-time arrangements with its seven stockholders. These arrangements are less inclusive than those of NBC and CBS in that they cover only 3¼ to 4¼ specified hours on weekdays and 6 specified hours on Sundays and apply to only about half of the stations associated with Mutual. The contracts expressly provide that the optional-time provision shall lapse if the Federal Communications Commission prohibits that practice or the other national networks voluntarily abandon it.

²⁴ The one limitation on the right of CBS to call upon its stations for time for network commercial programs is that a station is not obliged to broadcast more than 50 converted hours of network commercial programs during any particular week. But this limitation has had no practical effect whatsoever. At the time of the committee hearings no CBS outlet had ever carried as many as 50 converted hours of network commercial programs in any 1 week.

NBC and CBS argue that some form of time optioning is indispensable to network operation because broadcasting competes with other advertising media, such as newspapers and magazines, which are free to guarantee to advertisers definite coverage in terms of time, space, and circulation. But firm commitments and guarantees for broadcast advertising are not dependent upon time options. Historical analysis shows that the networks did not institute time options to protect themselves against competition from newspapers or magazines. NBC adopted optional-time provisions because CBS had already done so and was thereby deriving a competitive advantage. NBC's vice president in charge of station relations testified:

At least one of our competitors [CBS] was in a much more fortunate position in that respect, having a substantial number of contracts, so we understand and believe, which enabled it to secure right of way at any time of the day or evening. Of course that made it possible for the competitor to tell one of our clients who was dissatisfied with the inadequate network turned up, as a result of our availability requests, that he was in a position to deliver complete coverage and he would show the list of stations. As a result, we have lost considerable business (Hedges, Tr. 1722-1723).

Similarly, in 1940 Mutual adopted a number of optional-time provisions in its more important contracts in order to compete with the other national networks.

A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.

We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from "stability" of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest.

The fact that NBC was able to carry on its business for 7 years without time options, and changed only when CBS began to derive a competitive advantage from its time options, as well as the somewhat similar experience of Mutual, lead us to the conclusion that time options, with their restraint upon the freedom of licensees, are not an essential part of network operations. With all the networks operating on an equal footing, the absence of optional time as it now exists will not, we believe, hamper network operations or drive advertisers to other media.

D. REJECTION OF NETWORK PROGRAMS

While station rejection of network programs is not solely a problem of competition, its close relation to optional time and its general importance as an element of network broadcasting require its consideration.

It was noted in the preceding chapter that most NBC and CBS affiliates are required to take network commercial programs unless such

programs are not in the public interest.²⁵ NBC even goes so far as to require that the licensee "be able to support his contention that what he had done has been more in the public interest than had he carried on the network program." Thus, the burden of proof is placed upon the licensee.

Practical difficulties confront a licensee who conscientiously seeks to carry out his duty to furnish the public with the best available programs. Precise information concerning the program the network proposes to distribute is not usually furnished and is not always easy to furnish. If, in addition to this obstacle, the licensee is not allowed to reject a program unless he can prove to the satisfaction of the network that he can obtain a better program, his efforts to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course. The limitation on the right of rejection contained in the NBC and CBS contracts removes the licensee's incentive to find out what the network program is going to be.

It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.

We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance. Only thus can the public be sure that a station's program service will not be controlled in the interest of network revenues.

These are principles of general application based on sections 301, 309, and 310 of the Communications Act. They apply to stations receiving programs from national networks, from regional networks, or from any other person engaged in supplying programs.²⁶ The licensee himself must discharge the responsibilities imposed by the law.

E. NETWORK OWNERSHIP AND OPERATION OF STATIONS

At the present time, NBC is the licensee of 2 stations each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland, or 10 stations in all. CBS is the licensee of 8 stations, 1 in each of the following cities: Charlotte, Minneapolis, St. Louis, Los Angeles, Chicago, Washington, New York, and Boston. Mutual has never owned any stations. At the time of the committee hear-

²⁵ *Supra*, pp. 38-39.

²⁶ See, in this connection, *Applications of Westinghouse Electric & Manufacturing Co. for Renewals of Licenses*, Docket Nos. 5823, 5824, 5825, and 5826, September 4, 1940.

ings, however, Mutual was owned by the licensees of stations WGN at Chicago and WOR at Newark. In January 1940, as previously set forth,²⁷ stock in Mutual was issued to 5 additional affiliates.

The 18 stations presently licensed to NBC and CBS are among the most powerful and desirable in the country. Of the 25 1-A clear-channel stations in the country, NBC and CBS are the licensees of 10. They are located in the largest and richest markets and their station rates, time sales, and revenues are among the highest for all stations.

Long-term affiliation contracts, with their exclusivity and optional-time provisions, seriously interfere with competition among networks. Ownership of broadcast stations by networks, however, goes even further. It renders such stations permanently inaccessible to competing networks. Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This "bottling-up" of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks.

Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity.²⁸ The danger is present that the network organization will give preference to its own stations at the expense of its affiliates.²⁹

Assuming that the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated. However, this Commission and its predecessor, the Federal Radio Commission, have heretofore approved as in the public interest the acquisition by NBC and CBS of most of these owned or operated stations and have periodically renewed the licenses of such stations. From a legal standpoint these circumstances confer no vested rights upon NBC or CBS, but we think it inadvisable to compel these networks to divest themselves of all of their stations.

In New York, Chicago, and Los Angeles or San Francisco, network operations have become so interwoven with station ownership that we do not deem it in the best interests of radio broadcasting to divorce the two at this time. Stations in these "key" cities make available a substantial minimum audience for network sustaining programs and

²⁷ *Supra*, p. 28.

²⁸ Owned or controlled stations have been far more profitable per unit than affiliated stations (*supra*, p. 33). This, however, does not necessarily indicate that there has been preferential treatment, since owned or controlled stations are, in general, high-power stations located in lucrative markets.

²⁹ CBS argues that the ownership of key stations by networks is essential as a reserve source of financing for network sustaining programs in the event network business should recede for a substantial period. It is pointed out in this connection that one of the paradoxes of the radio business is that when advertising revenue falls, the expense of servicing a network rises. It is true that the stations owned and operated by CBS have been extremely profitable, and to that extent they have strengthened the financial position of CBS. But the CBS network business has also been extremely profitable. As early as 1930, CBS had a net income of almost a million dollars, although it owned only two stations. The CBS network has not required any reserve for financing its network sustaining programs, and it is extremely unlikely that its owned stations could furnish such a reserve: for in the event that broadcasting fell on hard days and network income did recede, station income would no doubt similarly recede. Thus investments not dependent on broadcasting revenues would operate as a far more stabilizing factor than investment in stations.

enable the networks to make provision for adequate studios and other facilities on an economic basis at talent centers. They permit the networks to experiment with new techniques of program production and new ideas in program content and balance, and give assurance that the experiments will have a fair test over good facilities. In the light of these conditions and the fact that there exists in these cities the largest supply of stations, we do not deem it advisable to prohibit a national network organization from being the licensee of one station in these "key" cities.

Different considerations apply to other stations licensed to NBC and CBS. We do not believe, for example, that any substantial justification can be found for NBC's operation of two stations in New York, Washington, Chicago, or San Francisco. In none of these cities are the better radio facilities so numerous as to make it in the public interest for any one network organization to control two stations; in each case such dual ownership is bound to obstruct the development of rival networks and the establishment of new networks. In Washington (excluding local stations) there are but three regional stations, of which NBC controls two, and one clear-channel station, which is owned by CBS. In Chicago, the equivalent of 70 of the four 50,000-watt full-time facilities are owned by NBC,³⁰ and one by CBS. In San Francisco, the only two stations with better than regional power are NBC's. Competition will be greatly strengthened if the best facilities in important cities are not so tied in the hands of a single-network organization. Even in New York, where desirable facilities are more plentiful, NBC's ownership of two clear-channel stations gives it a dominant position which tends to restrict competition on even terms from other networks.

We find, accordingly, that the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest. In any particular case, of course, networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable.

In several cities where NBC or CBS owns one station, the available facilities are so few and of such unequal coverage that network ownership is undesirable. In Cleveland, a most important radio market, the only broadcasting facilities are one clear-channel station (owned by NBC), two full-time regionals, and one part-time regional. Charlotte, N. C., has but two stations, one of which is a 50,000-watt station owned by CBS. It seems clear that no network ownership whatsoever should be allowed in either of these cities. In several other cities, such as Denver (NBC), Minneapolis (CBS), and Washington (NBC and CBS), the available facilities are somewhat more plentiful, but the disparity among the facilities raises serious doubts whether any network ownership should be permitted. We find that it is against the public interest for networks to operate stations in areas where the facilities are so few or so unequal that competition is substantially restricted.

³⁰ There are five 50,000-watt stations in Chicago, but two of them (WENR and WLS) share time. NBC owns WMAQ and WENR. WENR is authorized to utilize the great majority of the valuable commercial hours. From Monday to Friday, WENR utilizes the time from 3 p. m. to 6:30 p. m., and from 8 p. m. on. On Saturday, WENR utilizes the time from 3 p. m. to 6:30 p. m., and on Sunday, from noon until 7 p. m., and from 8 p. m. on.

NBC and CBS have such competitive advantages over any actual or potential rival that no additional stations should be licensed to either and they should be required to dispose of some of the stations now licensed to them. We do not, however, deem it advisable to specify at this time a precise maximum figure for network ownership.

In exercising our licensing powers with respect to the renewal of the licenses now held by NBC and CBS, we propose to consider the applicability of the two principles hereinbefore set forth. Subject to the right and opportunity of CBS and NBC to show at hearing in a particular case that public interest requires otherwise, the Commission will not license to a single network organization more than one station within a given area, nor will it license stations to any network organization in communities where the available outlets are so few or of such unequal desirability as to require that all facilities be open to competition among networks for outlets and among stations for networks. In considering methods of divorcement, we will seek to ensure that the divorce of stations from networks shall be actual as well as formal, and will permit the orderly disposition of properties.

Mutual presents a somewhat different problem. The network corporation itself does not own or operate any stations; however, the stock of the network corporation is owned by various station licensees. This difference has several important practical aspects. To begin with, the licensees which own Mutual are not under common control and, therefore, there is no concentration of ownership or control of radio facilities in any one organization. Likewise, and probably more important, the network cannot control its owners; on the contrary, it is controlled by them. The stations which own Mutual can terminate the ownership relation by disposing of their stock. The choice in the case of Mutual is with the station, rather than with the network as in the case of NBC and CBS.

However, the foregoing does not completely solve the problem. The licensees which own Mutual have an interest in the network which tends to cause them to prefer Mutual programs over those of other networks. The judgment of licensees in making a choice among available programs should not be subject to distortion by such extraneous considerations. Under some circumstances, therefore, licensee ownership of networks might be subject to serious objection. However, there seem to be at least two reasons for not taking action in this connection at the present time. First, the three substantial interests in Mutual (25 percent each) are held by station licensees in New York and Chicago and a regional network (Don Lee) on the Pacific Coast which controls four California stations. Thus, the dominant interests in Mutual roughly parallel the direct ownerships of NBC and CBS which this report does not seek to disturb. Secondly, Mutual does not own studios, station facilities, or any substantial amount of property. It is largely a corporate vehicle for a cooperative network arrangement. Consequently, the licensee stock interests in Mutual are, at present, from an investment standpoint, largely symbolic. For the present at least, and particularly in the light of the dominant position of CBS and NBC, there is no reason to require these licensees to divest themselves of their stock interests in Mutual.

Accordingly, at this time we find no reason to establish a definite policy concerning licensee ownership of networks. If, in the future, the question becomes significant, we will give it further consideration.

F. NBC'S RED AND BLUE NETWORKS

Largely because it has 2 networks, many more stations are affiliated with NBC than with any other network organization. When NBC presented evidence at the committee hearings it had 161 outlet stations; the number had increased to 214 by the end of 1940. NBC is the licensee of 2 stations in each of 4 cities. At the time of the committee hearings, NBC had 2 outlets in over 30 cities. The number of cities in which there are 2 NBC stations is now about 40. One is generally a Red network station and the other a Blue network station, although the demarcation is frequently not clear.

The Red network carries more commercial programs, and the Blue more sustaining programs; the disparity in this respect is marked. In 1938, NBC sent 74.5 percent of its commercial programs over the basic Red and only 25.5 percent over the basic Blue. Although NBC does not separate income and expense as between them, the Red is obviously the money-maker of the two. In 1938 NBC paid its 17 independently owned outlets on the basic Red network \$2,803,839 for network commercial programs; to the 18 on the basic Blue network it paid only \$794,186.

Despite this great disparity, NBC's network affiliation contracts do not specify whether a given station is to be affiliated with the Red or the Blue network. NBC retains the right to shift a station from one network to the other, regardless of the station's wishes. This power gives NBC undue control over its affiliated stations.

NBC's witnesses testified that the Red and Blue networks compete vigorously for listening audiences and for the advertising dollar. But the competition between Red and Blue is largely of an intramural character. Even taking into account the changes which NBC has made in its organization since the time of the committee hearings, there is no complete allocation of stations or programs between the Red and Blue networks, nor any clear demarcation between the properties, personnel, income or expenses of the two networks. No claim is made that the two networks compete for affiliates. So far as competition for advertising and listeners is concerned, it is conducted in a friendly manner under the direction of the NBC board of directors and for the financial benefit of NBC.

Although the sales and program personnel allocated to the Red or the Blue network may now engage in friendly rivalry, it is hardly to be supposed that this rivalry will ever reach the point where NBC employees are acting against the best interests of NBC. Under such conditions, there can be no competition as that term is properly used.

NBC's chairman testified that if NBC owned all four networks, there would still be a competitive situation so far as the listener is concerned. This is a time-worn argument of corporations facing charges of monopoly. It proves too much, and reduces the whole theory of our competitive economy to an absurdity. What NBC's chairman was pleased to call "competition" is not the thing that keeps the opportunity to engage in network broadcasting open to anyone willing to risk his capital and energy, nor does it assure the public the benefits of the healthy and vigorous interplay of economic forces among those engaged in the business. If a single company owned and operated all the drug stores in a city, there would be no less a monop-

oly because the company refrained from closing all the stores but one, or even organized sales campaigns among the various stores. As long as all the efforts of the employees redound to the benefit of a single employer, there is merely the shadow of competition without its substance.

The operation of the Red and Blue networks by NBC gives it a decided competitive advantage over the other two national networks. In the first place, under the NBC discount policy, a discount up to 25 percent is granted to advertisers based upon the amount of business they do with NBC. This gives the Blue network, for example, a marked advantage over the other networks in getting the business of a national advertiser who is already sponsoring a program over the facilities of the Red network. In addition, NBC grants certain special discounts to advertisers to encourage the sale of time over certain Blue network stations.

Again, NBC is able to arrange certain of its most attractive facilities into one combination. In view of the differences between the power and frequency of individual stations, NBC's ability to substitute a more desirable station if an advertiser is dissatisfied with the one customarily provided puts its competitors at a decided disadvantage.

Likewise, the operation of two networks gives NBC a great advantage in terms of programming. By this arrangement, NBC has roughly twice as many hours at its disposal each day as does either CBS or Mutual. For any single period, CBS and Mutual must make a choice between two commercial programs, or between a commercial and sustaining program, or perhaps between an entertainment and a public service feature. NBC, with two networks at its disposal, can simultaneously send an educational program over the Blue and a variety entertainment commercial program over the Red. Furthermore, NBC is in a position to assure advertisers buying time on one of its networks that they will not meet serious competition for listening audiences from the programs scheduled simultaneously on its other network.

NBC takes the position that station demand for affiliation with it is the reason for its two networks. But it is not without significance that NBC's second network—the Blue—was formed before this demand had had any real opportunity to manifest itself. The Blue network was organized in 1926, immediately after NBC took over station WEAJ (the key station of the Red network) and the Telephone Co. network. RCA already owned station WJZ, and this station was the basis of the present Blue network.

But without regard to how or why NBC created two networks, it seems clear that the Blue has had the effect of acting as a buffer to protect the profitable Red against competition. Available radio facilities are limited. By tying up two of the best facilities in lucrative markets—through the ownership of stations, or through long-term contracts containing exclusivity and optional-time provisions—NBC has utilized the Blue to forestall competition with the Red. We have already noted that Mutual is excluded from, or only lamely admitted to, many important markets. In such important cities as Milwaukee, Toledo, Salt Lake City, and Jacksonville, both the Red and the Blue have outlets, but Mutual can get no affiliation whatever. In Cleveland, Baltimore, New Orleans, Louisville, and Atlanta, both

the Red and the Blue have outlets, but Mutual can get only an unsatisfactory facility in terms of power or coverage. In Houston, Birmingham, Providence, Des Moines, Memphis, Oklahoma City, and Tulsa, the Red and the Blue are provided for but Mutual must share an affiliate. The effect upon a new network of NBC's preemption of the best facilities in many markets would, of course, be even more restrictive. The existence of this situation can hardly fail to discourage anyone who might otherwise seek to enter the network broadcasting field.

We are impelled to conclude that it is not in the public interest for a station licensee to enter into a contract with a network organization which maintains more than one network. With two out of the four major networks managed by one organization, a station which affiliates with that organization thereby contributes to the continuance of the present noncompetitive situation in the network-station market. The reestablishment of fair competition in this market is contingent upon ending the abuses inherent in dual network operation; our regulation is a necessary and proper means of reestablishing that fair competition.

Our determination that it is not in the public interest for a station to enter into a regular affiliation contract with a network organization maintaining more than one network does not, however, rest merely upon competitive considerations. We are seriously concerned also with the maintenance of a free radio system from the point of view of concentration of power over licensees and their listeners.

In most large countries today, radio broadcasting is a governmental monopoly.³¹ The United States has rejected government ownership of broadcasting stations, believing that the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions to permit its exercise by one body, even though elected by or responsible to the whole people. But in avoiding the concentration of power over radio broadcasting in the hands of government, we must not fall into an even more dangerous pitfall: the concentration of that power in the hands of self-perpetuating management groups.

Under any system of broadcasting, someone must decide what a station will put on the air and what it will not. Someone must select some programs and reject others. Congress has chosen to leave that power in the hands of individual station licensees, subject to the public interest provisions of the Communications Act and the powers delegated to this Commission. Decentralization of this power is the best protection against its abuse. We cannot permit the protection which decentralization affords to be destroyed by the gravitation of control over two major networks into one set of hands. While the concentration of power resulting from operation of a network is unavoidable, the further concentration of power resulting from operation of two networks by one organization can and should be avoided.

The radio spectrum is essentially public domain. In delegating to this Commission the power to license, Congress was moved by a fear that otherwise control over that public domain would gravitate into

³¹ Huth, *La Radiodiffusion Puissance Mondiale*, *passim*.

too few hands.²² Stations entering into regular affiliation contracts with a network organization operating more than one network defeat the manifest intent of Congress. We conclude that such concentration of power over licensees and their audiences violates the public interest.

G. LIMITATION OF COMPETITION BETWEEN NETWORK AND OUTLET

Improvement in the quality of electrical transcriptions in recent years has made it possible for individual stations, including network affiliates, to compete with networks for some of the business of national advertisers. In 1934, national spot business involving the use of electrical transcriptions amounted to \$13,500,000; in 1938, to \$34,680,000. Transcriptions have made it possible for affiliates to compete for national business by offering programs comparable in popularity to those of the networks. Continuing and unrestricted competition between network and outlet for this business will provide the public with steadily improving program service.

NBC has attempted to protect itself against competition with its affiliates for the business of national advertisers by inserting the following provision in its affiliation contracts:²³

If you accept from national advertisers net payments less than those which NBC receives for the sale of your station to network advertisers for corresponding periods of time, then NBC may, at its option, reduce the network station rate for your station in like proportion, in which event the compensation due you from NBC will be likewise reduced but the right of termination provided for in the preceding paragraph shall not thereby accrue to you.

This provision means that an affiliated station cannot accept the business of a national advertiser at a rate lower than that which NBC has established as the affiliate's rate for network programs without subjecting itself to the risk that this lower rate will be applied to all of the affiliate's network business. A contract of this kind, providing a severe penalty for price-cutting, is equivalent to, and has the same effect as, a price-fixing agreement.

NBC frankly concedes that the purpose of the provision is to prevent its affiliated stations from entering into competition for national advertising business:

This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. *It means that we do not believe that our stations should go into competition with ourselves.* It means that if a national advertiser is able to plan a campaign whereby he could place a partial network order and a partial transcription order on these stations, in order to save money, all network business suffers, and this precaution was put in there to prevent that. However, we have not, up to date, reduced any of the station rates to meet the rates fixed by the stations themselves for national spot advertising, but that is no promise that we will not do it.

Last summer, one of the leading advertising agencies in the country that places millions of dollars' worth of business in radio advertising, in discussing a particular account that was on the NBC network, pointed out the wide discrepancy that exists at some stations between the charges which the National Broadcasting Co. makes and the charges which the station makes. The discrepancy was sufficiently great that with a list of 15 or 16 stations which were shown to me, *if the national advertiser had been willing to sacrifice the advantages of simultaneous live talent broadcasts and substitute therefor electrical transcriptions*

²² *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137.

²³ There is no similar provision in either the CBS or Mutual affiliation contracts. For a description of the way in which their contracts operate, see *supra*, pp. 34-44.

on those 15 or 16 stations, the client could have been able to save \$44,000 in 1 year, and that is not particularly healthy, in my estimation (Hedges, Tr. 1825-26). [Italics supplied.]

No other explanation of NBC's position was made and no reason appears why the affiliate's national spot rate should be artificially pegged at the network rate. In setting the network station rates of its affiliates, NBC considers primarily the potential circulation or listening audience of each station. According to the testimony of its vice president in charge of station relations, absolutely no account was taken of the local competitive situation. Stations whose potential audiences were the same were given the same network rate whether they were the sole stations in their communities or had to split their audiences with several competing stations. Likewise, no account was taken of the purchasing power of the communities served by the affiliate, or of other factors that might affect the value of the station to advertisers.

Several factors tend to make national spot rates lower, at least where electrical transcriptions are used, than comparable network rates. In the first place, electrical transcription programs avoid the heavy telephone line charges incident to network broadcasts. Transcription programs are distributed to stations by shipping the actual discs on which the programs have been recorded.

Furthermore, opinions differ concerning the relative advertising effectiveness of transcriptions and live talent programs. There is no reason why such differences of opinion should not be permitted to play a part in negotiating station rates, or why they should not be reflected in rate differentials between the two types of business.

Finally, only the less desirable hours of the broadcast day are outside the NBC optional-time provisions and thus available for national spot business without being subject to call by NBC. If time within the option period is sold, such programs are subject to be shifted by NBC on 28 days' notice. This inability to enter into firm commitments makes national spot programs less desirable to advertisers than NBC network programs. While the elimination of option time will remove this factor, the others will, of course, remain.

It is no wonder, therefore, that many of NBC's affiliates, despite the danger of sanctions, have adopted a national spot rate less than the network rate. One exhibit shows that 53 NBC affiliates have a national spot rate lower than the network rate, whereas only 36 have a higher rate.

Despite the large number of affiliates whose national spot rates were lower than the network rate, NBC's vice president in charge of station relations testified that NBC had never reduced a station's network rate for this reason. But, he added, "that is no promise that we will not do it." The threat that the network rate will be reduced is ever present. The failure to invoke the power to reduce the network rate does not show that the provision has been ineffective. The mere retention of the power seems to have been sufficient to prevent the kind of free competition regarded by NBC as "not particularly healthy." Apparently the suggestion made in the summer of 1938 that one large advertiser could save some \$44,000 annually by using transcriptions over 15 or 16 NBC affiliates did not develop beyond the stage of a mere suggestion. There is no evidence in the record that any adver-

tiser and group of affiliates had the temerity to carry through such a money-saving project to determine whether NBC would invoke the rate-control provision of its affiliation contract when some real competition was offered.

We conclude that it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers.

H. INTERRELATIONS AMONG NETWORK PRACTICES

In considering above the network practices which necessitate the regulations we are adopting (*infra*, p. 91), we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly. A few examples will suffice to illustrate the way in which restraints in the network field reinforce one another and cumulatively impair the freedom of licensees to render the best possible public service.

Consider in the first place the conjoint effect of the restraints on the establishment of a new network. With more than 97 percent of the Nation's nighttime wattage affiliated with existing networks, a new network can hardly be built up from among unaffiliated stations. Nor are many affiliates free to change their affiliation to such a proposed new network, for most of them are under 5-year contracts.

If stations already affiliated should wish to carry some programs of such a proposed new network, they are restrained by their exclusivity clauses. And even without these exclusivity clauses, time sold to a new national network would be subject for the most part to options on 28 days' notice—thus preventing the development of an effective program series. Thus each doorway into the network field is both locked and bolted.

The exclusion of new networks from the industry is especially onerous because of the failure of existing networks to render service on a truly national basis. They have left a number of communities, especially in the West and Middle West, wholly without network service, and many more with inadequate service or service from only one network. Under such circumstances, it is especially important to keep the door open for new networks which may be willing to serve areas now unprovided for.

Consider next the position of a licensee tied to a network by the usual standard affiliation contract when he seeks to procure programs sponsored by national advertisers. The exclusivity clause of his affiliation contract prevents him from accepting such a program from any other network; hence he must either get it through the network with which he is affiliated or else try to get it on a spot basis.

But in soliciting a national advertiser for spot business, the licensee of a network-affiliated station runs up against the fact that all or the best part of his station's time is under option to the network, subject to 28 days' notice. Hence he cannot enter into a firm contract with the national advertiser for a period long enough to insure the

advertiser of building a continuing audience. Some NBC affiliates are also hampered by the clause which enables NBC to penalize them if they sell time to national advertisers directly for less than NBC charges for their time.

Affiliates are heavily dependent upon their national network for access to national advertisers; but the network may have interests quite disparate from its outlets. It may, for example, own two networks and favor one as against the other. Or it may own stations itself, and hence be in a position where it will profit more by favoring the scheduling of programs over the stations it owns rather than over the full network. In short, the joint effect of the various practices mentioned is to place the licensee to a considerable degree at the mercy of the network with which he is affiliated, but to leave the network free to pursue interests which may be very different from those of the licensees affiliated with it. And, although the network may abandon him on 1 year's notice, a licensee, dissatisfied with the arrangement, cannot renounce it; he is bound for a period of 5 years.

Consider also the position of a station licensee who seeks to maintain a well-balanced schedule of local, regional, and national programs. He can broadcast important local events during periods when network commercial programs are being offered only if he can sustain the burden of proof that the network programs are not in the public interest. His local programs during all or many hours of the broadcast day can only be scheduled subject to the network's option on those hours. Only under exceptional circumstances can he schedule a local program for a time when the network is offering him a network commercial program. If a local sponsor demands assurances that his broadcast time will not be preempted by the network under its option, the station licensee has the choice between not scheduling the local sponsor's program at all or scheduling it for a period which the network gives to a regular sustaining program, thus depriving listeners of that sustaining program. Nor can the listeners procure that sustaining program through another local station, for the network affiliate has territorial exclusivity either by contract or in practice.

Consider in the third place the position of listeners in cities like Milwaukee, Toledo, Salt Lake City, and Jacksonville, in which Mutual can obtain no outlet whatsoever. Such listeners are, thanks to the usual exclusivity clause, deprived of Mutual program service even though the station licensees may wish to offer it along with NBC or CBS service. Where an NBC or CBS station rejects a network program, listeners are deprived, thanks to the territorial exclusivity clause, of an opportunity to hear that program even though another station wishes to broadcast it. The time-option clause and the clause restricting an NBC affiliate's right to compete with NBC deprive listeners of an opportunity to hear locally sponsored programs which might otherwise be available. The clause requiring affiliated stations to broadcast all network commercial programs offered during option hours, subject only to the usual "public interest" proviso, deprives listeners of the opportunity to hear other programs which the station might prefer to schedule during those periods.

At every turn, in short, restrictive clauses taken cumulatively operate with even greater force than their effect considered in isolation

would suggest. Our decision to promulgate the regulations considered in this chapter is buttressed by this consideration of cumulative effect. This bundle of restraints upon the station licensees is not compatible with the public interest.

I. STATUS OF NETWORK-STATION RELATIONSHIPS UNDER THESE REGULATIONS

This report is based upon the premise that the network system plays a vital role in radio broadcasting and has brought great benefits to it. We have carefully drawn our regulations so as not to interfere with any of the three major functions which a network performs—the sale of time to advertisers; the production of programs, both commercial and sustaining; and the distribution of programs to stations.

Under the regulations herein set forth, a network will still be able to enter into regular affiliation contracts. A station will still be able to hold itself out as the regular affiliate of a given network.

A network can still sell the use of its facilities to advertisers in accordance with published rate schedules in much the same manner as it now does. The fact that networks must ascertain whether each station has a specific period uncommitted before entering into a firm contract for that period need not unduly hinder their selling activities. The network can and undoubtedly will require that all stations intending to broadcast its programs keep it currently informed of all station commitments.

The networks' right to produce programs is wholly unaffected. Their right to distribute programs is vastly enlarged, for hereafter any network will be free to distribute programs to any station.

Similarly, networks will be free to offer program service to stations regularly affiliated with them throughout any or all of the hours of the broadcast day. We do not see that the public interest requires, and nothing in our regulations necessitates or suggests, that stations shift hourly from network to network. We are concerned rather with insuring that, at reasonable intervals, a station will be free to change its regular network affiliation, and, as occasion requires, to broadcast the programs of networks with which it is not regularly affiliated, and to exercise independent judgment in rejecting or refusing network programs. To the extent that the networks' present status rests upon excellence of service rather than coercive power, it will remain substantially unaffected.

J. APPLICATION OF REGULATIONS TO REGIONAL NETWORKS

Examination of the record herein indicates that the practices of national networks subjected to criticism by us are followed by certain regional networks.³⁴

We recognize that the regional networks are in a state of more rapid flux than the national networks; and that new regional networks have arisen since the committee hearings were held. Accordingly, we will carefully consider, in particular instances, any showing that the application of the regulations herein adopted to a station affiliated with a regional network will reduce rather than increase its ability to operate in the public interest.

³⁴ See *supra*, p. 29; *infra*, Appendix D.

Regional networks fall into two classes—purely regional networks, and nationally affiliated regional networks which act as conduits for national network programs.²⁵ The record indicates that the conditions which will be affected by the regulations contained in this report are more common among nationally affiliated regional networks than among regional networks not so affiliated.

Some regional network affiliation contracts contain exclusivity clauses preventing stations from carrying any network programs, regional or national, not sent through the regional network. Some contain clauses which prevent regional networks from sending programs to other stations in areas served by their affiliates; this clause is effective even though the affiliate rejects the network program. Some regional networks have options on substantially all the time of their affiliates; and some stations affiliated with regional networks have signed away their right to reject network commercial programs offered during optioned hours, save only for the usual proviso concerning programs the broadcasting of which would violate the "public interest" provision of the Communications Act. At least one regional network's standard affiliation contract provides that the network may proportionately reduce the compensation of any station which sells time to advertisers at less than the rate which the network charges for that station; thus, the stations are prevented from competing freely with the network for advertisers. Another regional network's contracts are binding upon its affiliates for 5 years, though on the network for only 1.

Restrictive contracts and the other practices with which these regulations are concerned restrain competition and operate against the public interest whether the network concerned is national, nationally affiliated regional, or purely regional. True, the national network restraints loom larger; but this should not and does not blind us to the need for terminating or forestalling similar restraints whose only distinguishing characteristic is that they are of local or regional rather than national scope. With respect to a given station, a given community, or a given region, a restrictive contract between a station and a regional network, or ownership of many stations by a regional network, may operate to foster a local monopoly and to impair station operation in the public interest just as effectively and as intensively as similar practices on a national scale.

With respect to nationally affiliated regional networks, the need for applying our regulations is especially clear. When a licensee enters into a long-term exclusive contract containing optional time and other restrictive clauses with a nationally affiliated regional network, the effect, so far as restraint of competition is concerned, is substantially the same as if the station had entered into such a contract directly with a national network. Indeed, in some situations the effect may be even more restrictive. Consider, for example, the plight of a station in Washington or Oregon which wishes to carry Mutual network programs. Mutual has an exclusive contract with Don Lee

²⁵ As used in this report "nationally affiliated networks" include not only regional networks directly affiliated with national networks but also regional networks which, like Pacific Broadcasting Co., carry national network programs fed to them by other nationally affiliated regional networks. In both cases the regional network serves as intermediary for the delivery of national network programs to stations. Certain of the outlets of some of the regional networks are also affiliated, on an individual basis, with NBC, CBS, or Mutual. See table on p. 29; see also Appendix D.

providing that it will send programs to Pacific coast stations only through Don Lee. The latter, in turn, has an exclusive contract with Pacific Broadcasting Co. providing that it will send programs to stations in Washington and Oregon only through Pacific. The Pacific standard affiliation contract binds a station for 5 years, prevents a station from carrying any network programs not delivered to it by Pacific, places all of the station's time under option to Pacific, and deprives the station of the right to reject network commercial programs except only those which would interfere with a locally originated program of "major public interest or public necessity". Thus, in order to get Mutual programs, a station in Washington or Oregon must subject itself to these restrictive conditions for a 5-year term, and must bind itself to accept both Pacific and Don Lee as well as Mutual programs. And even then its access to Mutual programs is conditional. If Pacific severs its affiliation with Don Lee, or Don Lee leaves Mutual, the station is shut off from Mutual for the life of its contract.

Exempting the relationship between regional networks and their outlets from the regulations here presented would open the way for permitting this type of arrangement to become the usual pattern of network affiliation. National networks might then surround themselves with a group of associated regional networks, and if stations were permitted to enter into restrictive affiliation contracts with these regional networks, the present restraints would be perpetuated. Our application of the regulations to the relationship between the stations and regional networks as well as to national networks will make impossible such developments.

Many regional networks now operate successfully within the scope of these regulations. Some of these regional networks are in fact cooperative station enterprises, bound together by mutual interest rather than by formal contract. Others are profit enterprises binding stations to them by contract; such contracts vary all the way from those wholly permissible under the regulations to those transgressing substantially every regulation. In general, it may be said that the more powerful a network becomes, the more restrictions it is able to place upon its outlet stations. We believe that this process of increasing restrictions should be reversed, and that stations affiliated with regional networks should retain their freedom of operation in the public interest as fully as stations affiliated with national networks. Accordingly, we find that the public interest requires the application of the regulations to stations affiliated with regional as well as national networks. In the application of these regulations to regional networks, and particularly the regulation with respect to ownership of stations, the Commission will take into consideration any factors of a local character which tend to remove them from the purposes of the regulations we are adopting.

VIII. JURISDICTION

We are satisfied that the Commission has jurisdiction to issue the regulations contained in the attached order, both as an exercise of its licensing function in the public interest and under the grant of authority contained in section 303 (i) "to make special regulations applicable to radio stations engaged in chain broadcasting." Either basis alone amply supports our jurisdiction; together they leave no doubt that the power exercised in these regulations is within the clear intent of Congress. But since much of the oral argument was devoted to the question of the Commission's jurisdiction, and since supplementary briefs discussing this question were filed by several interested parties pursuant to the direction of the Commission, we include a short statement of the legal basis for our conclusions.

A. JURISDICTION UNDER THE COMMISSION'S LICENSING POWER

In considering the scope of the Commission's licensing power as a basis of jurisdiction in this proceeding, two questions are presented: First, has the Commission authority to deny a license or a renewal on the ground that the applicant's contractual relations with a network either impair his ability to operate in the public interest or limit the maximum utilization of radio facilities by artificially restraining competition and restricting the growth and development of new networks? Secondly, if the first question is answered in the affirmative, can the Commission formulate into general rules and regulations the principles which it intends to apply in passing on individual applications?

1. The power to deny applications

Congress has delegated to the Commission the task of determining whether the grant of an application for a license or renewal will serve "public interest, convenience, or necessity." The standard of public interest is given significance "by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services," and by the general objectives of the statute.¹ As thus construed by the Supreme Court, the term "public interest" clearly refers to the interest of the listening public in the fullest and most effective utilization of radio facilities.

The general objectives of the Communications Act, as stated in section 1, are to "make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." This provision is supplemented by section 303 (g) which provides that the Commission

¹ *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 285; cf. *United States v. Lowden*, 308 U. S. 225.

shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest.

We have already seen that many of the provisions of the affiliation contract do prevent the licensee from fully utilizing his facility. Time options adversely affect the ability of licensees to serve the local needs of their communities for program and advertising service. Artificial limitations on the price which licensees may charge national advertisers hamper licensees' efforts to render the best possible program service. Restrictions imposed on the affiliates' freedom to reject network commercial programs prevent them from assuming their full statutory responsibility (which under the Act they cannot delegate) of determining what programs should go out over the facilities licensed to them. Exclusivity provisions which prevent affiliates from carrying the programs of other networks and which prevent any other station within the "territory" of the affiliate from obtaining programs from the latter's network, deprive many listeners of the opportunity to hear certain worthwhile programs. Long-term affiliation contracts prevent the licensees from bargaining at reasonable intervals for the best network programs. Affiliation with a network organization operating two networks contributes to a concentration of control over stations and the programs they broadcast incompatible with the public interest. Network ownership of a large number of stations creates a potential conflict between the interest of the network as a station owner and its interest as a network organization.

It is no answer to say that the network stations render better service to the public than do unaffiliated stations. This is by no means established by the evidence, particularly if consideration is given to such factors as the needs of the local communities in which the stations are located. But, even if the superiority of network station service were assumed, it would not follow that the regulations we are adopting are either unnecessary or invalid. The Commission's licensing function is not limited to determining simply whether the service of one station is satisfactory as compared with that of other stations. The Commission has the duty to grant licenses and renewals only to those applicants who propose a maximum utilization in the public interest of the facilities they request.

It would hardly be contended, for example, that the Commission lacks authority to deny a license or renewal to an applicant whose use of his facility is limited by an inefficient antenna design which fails to make the optimum use of an advantageous transmitter site. Surely the Commission would not be required to issue a license just because the applicant could show that he was laying down as strong a signal as that of other stations with the same power. If the peculiar advantages of his transmitter site would enable him to achieve more extensive coverage with a more efficient antenna system, the public interest demands that he install such an antenna.

It is fundamental that any determination of public interest must be based upon a consideration of the service a station renders against the background of the service it could render. We have found that however meritorious the service of network affiliates as compared to that of nonnetwork stations, that service could be markedly improved if the affiliates were free from the restrictions that now bind them. This is no different from the determination that a licensee does not operate in the public interest if he merely renders as good a service as that of other stations with equal power where his advantageous transmitter site would enable him to render a superior service with an efficient antenna system.

So far we have considered only the direct impact of these restrictions on the licensee's ability to serve the public interest. But this is only a part of the Commission's responsibility. The public interest in the fullest and most effective utilization of radio facilities is likewise adversely affected by the curtailment of competition which these restrictions entail. In the last chapter we noted that the network-outlet contracts have resulted in closing the door of opportunity to new networks and have stifled competition among stations for network affiliation, among networks for station outlets and between networks and stations for advertisers and listeners. We noted too that network ownership of numerous radio stations has likewise meant the curtailment of opportunities for new networks and has given the existing networks a substantial competitive advantage over any newcomers. We noted, further, that, with two of the four major networks managed by one organization, affiliation with that organization contributed to the continuance of the present noncompetitive situation in the network-station market. The net effect has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging "the larger and more effective use of radio in the public interest" if we were to grant licenses to persons who persist in these practices.

The Commission's duty to act also flows from the fact that Congress expressly wrote into the act the requirement of free competition in the radio field. It provided in section 3 (h) that persons engaged in radio broadcasting should not be deemed common carriers. By section 313 it specifically made the antitrust laws applicable to persons engaged in radio communication and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under section 313 and authorized the Commission to refuse a license to any person found guilty by a Federal court of having violated the antitrust laws with respect to radio communication. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof is substantially to lessen competition or to restrain commerce. These elaborate provisions against restraints on competition leave no doubt that Congress intended to safeguard free competition in the radio broadcasting industry. In the very Act in which it made clear its mandate as to free competition, Congress set up this Commission to license radio stations in the public interest. We cannot believe

that Congress intended to leave us powerless to deal with restraints which might fetter the free competitive field it sought to maintain or to require us to promote unlawful conduct by our own affirmative action.

The Supreme Court decisions interpreting the Communications Act and its predecessor support the view that the preservation of free competition is one of the objectives recognized by Congress. In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 474-5, the Court said:

Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137, the Court said:

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses.

While many of the network practices raise serious questions under the antitrust laws,² our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals.³

²In this category would be included at least territorial exclusivity and exclusivity of affiliation (*Montague & Co. v. Lowry*, 193 U. S. 38; *Shawnee Compress Co. v. Anderson*, 200 U. S. 423; *United States v. Terminal Railroad Assoc.*, 224 U. S. 383; *Standard Fashion Co. v. Margrane-Houston Co.*, 258 U. S. 346); and agreements between outlets and networks penalizing stations for selling time to national advertisers at less than the network rate. (*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *United States v. Trenton Potteries Co.*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.)

³The networks seem to contend that our power to deal with restrictions on competition is limited to the authority conferred in section 311. That section provides:

"The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

It is not entirely clear just what point the networks seek to make. If the argument they advance is that we cannot deny a license to an applicant on the ground that his practices violate the antitrust laws unless a Federal court has first found the applicant guilty, then they misinterpret our decision. We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.

If the contention is that we cannot consider restrictions on competition unless they do constitute violations of the antitrust laws and have been so declared by a Federal court, it completely disregards the legislative history of the Communications Act and its predecessor as well as Supreme Court decisions. The encouragement "of the larger and more effective use of radio in the public interest" which we are required to foster and the power to license stations to serve in the public interest are independent of the grant of authority contained in section 311. That section merely emphasizes the importance which Congress attached to the preservation of competition in the radio field. It directs or

The networks contend, however, that the Commission has no jurisdiction over the contractual relations between licensees and networks because they are "business" practices and policies beyond the pale of Commission action. The language of the Supreme Court in the *Sanders* case—"The act does not essay to regulate the business of the licensee"—is cited in support of this argument. The simple answer to this contention is that it misreads the *Sanders* case. The Court there held that the Commission has no authority over the business of broadcast licensees *qua* business, as it does in the case of common carriers. This is very different from a holding that, even in the presence of adequate ground of jurisdiction, an activity is exempt from regulations merely because it is a business practice. As stated by the Court:

In contradistinction to communication by telephone and telegraph which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

There is nothing in the *Sanders* opinion which gives any support to the contention that we cannot, in exercising our licensing function, consider factors which might affect the ability of the station to serve the public interest just because those factors happen to be what might be called the business of the licensee. In denying licenses to applicants on the ground that their contractual arrangements with the networks prevent them from utilizing the available radio facilities in the fullest and most effective manner, the Commission does not regulate the business practices of licensees. There is here no attempt to fix rates, to prescribe a uniform system of accounts, to regulate advertising, to supervise the programs or the business policies of the licensee, or to impose any of the obligations which are applicable to common carriers. The denial by the Commission of a license or renewal merely involves a determination that the contractual relations with the networks affect adversely the ability of licensees to operate their stations in the public interest. This is no different in principle from a denial of a license on the ground that a contract which a licensee has with a third person for the exchange of certain of his assets—obviously a business matter—renders him insolvent and incapable of operating in the public interest. Licensees cannot escape the consequences of their acts or shirk their duty of properly serving the public by the simple device of describing their operating activities as business practices.

authorizes the Commission, as the case may be, to refuse a license on the basis of a finding by a court that the applicant violated the antitrust laws, without requiring the Commission to hold its own hearing to verify the facts found by the court or to determine whether the practices which constitute the violation would in fact prevent the fullest use of radio facilities. It certainly does not detract from our power to refuse a license or renewal when our own hearing or investigation reveals that practices of the applicant (whether violations of the antitrust laws or not) prevent the maximum utilization of radio facilities.

2. The power to issue rules and regulations

The objection has been raised that even if we have the power to deny a license or renewal on the ground that a particular affiliation contract prevents an individual station from operating in the public interest, we are nevertheless without power to issue rules and regulations of general applicability. But this contention reads out of the Communication Act the power given to the Commission by Congress in section 303 (f) to "make such regulations * * * as it may deem necessary * * * to carry out the provisions of this act." See also section 303 (r). It would deny the Commission, too, the power contained in section 4 (j) "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based.⁴

B. JURISDICTION UNDER THE COMMISSION'S POWER TO MAKE SPECIAL REGULATIONS RESPECTING CHAIN BROADCASTING

If any doubts exist as to the propriety of the regulations viewed as an exercise of the Commission's licensing power, they are completely dispelled by section 303 (i). This section gives to the Commission the specific power to "make special regulations applicable to radio stations engaged in chain broadcasting." No language could more clearly cover what we are doing here.

It has been contended, however, that this provision only empowers the Commission to deal with problems of a technical nature involved in chain broadcasting. The complete answer to this contention is that the language employed by Congress is too broad and general to permit of so narrow an interpretation. We cannot assume that Congress did not mean what it said.

Moreover, the legislative history of this provision demonstrates that Congress did intend section 303 (i) to be of general application and specifically that it should include the power to deal with restrictions upon competition in chain broadcasting.

Section 303 (i) is carried over verbatim from section 4 (h) of the Radio Act of 1927.⁵ It appeared for the first time, in a somewhat

⁴ See *Administrative Procedure in Government Agencies*, 77th Cong. 1st sess., S. Doc. 8, p. 27.

⁵ The NBC brief in this proceeding quotes from page 21 of the Federal Radio Commission's *First (sic: Second) Annual Report to Congress* (1928) as evidence for the view that the Commission considered its power to regulate chain broadcasting under section 4 (h) of the 1927 act was limited to its obligation to maintain a fair, efficient, and equitable distribution of broadcasting facilities. The brief suggests that when Congress

different form, in the bill as reported by the Senate Committee on Interstate Commerce. It reads as follows:

When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.

The report of the Senate committee states that this provision gives to the Commission "complete authority * * * to control chain broadcasting."

The bill passed the Senate in the above form. The conference committee revised the section and reported it back in the more general and flexible form which finally became law.

The meaning of section 4 (h) was explained by Senator Dill, the Senate sponsor of the bill, in the debate on the conference report. He said:

In the first place, under this bill chain broadcasting today * * * is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Co., are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the independent small stations, as the man who wrote the telegram suggests.

While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.

* * * In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection.

I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. *Power must be lodged somewhere, and I myself am unwilling to assume in advance that the Commission proposed to be created will be servile to the desires and demands of great corporations of this country.* [Italics supplied.]

thereafter reenacted without change section 4 (h) as section 303 (i) of the Communications Act, it presumptively approved this interpretation by the Federal Radio Commission.

In fact, however, the Commission merely pointed out that it had issued a regulation (General Order No. 43, Sept. 8, 1928) limiting the use of cleared channels for chain programs by requiring a separation of 300 miles between stations broadcasting such programs; with certain exceptions; and that later, for reasons of policy, it had suspended the order. Neither in the passage quoted nor elsewhere in the report did the Commission even allude to any limitation in its jurisdiction over chain broadcasting. Moreover, it does not follow from the fact that this regulation was concerned with fair distribution of facilities that the Commission construed this section as applicable only to problems of a technical nature involved in chain broadcasting. Consequently, there is no logical basis for the presumption contended for by NBC. *Cf. Helvering v. Hallock*, 309 U. S. 196.

* S. Rep. 772, 69th Cong., 1st sess. (1926), p. 3.

* 68 Cong. Rec. 2881. See also statements by Representative White, 68 Cong. Rec. 2579-2580, and by Senator Dill, 67 Cong. Rec. 12,352.

This explanation of the scope of section 4 (h) by the Senate sponsor of the bill completely substantiates the Commission's jurisdiction to issue the regulations involved here. It shows that section 4 (h) was written into the statute to remove any possible doubt which might exist under the licensing provision of the Act with respect to the Commission's power to regulate chain broadcasting. As Senator Dill said: "While the Commission would have the power under the general terms of the bill, the bill specifically sets as one of the special powers of the Commission the right to make specific regulations for governing chain broadcasting."

IX. CONCLUSION

We have exercised our jurisdiction upon the premise, generally accepted by the public and the industry, that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio. The regulations which we are promulgating are designed to preserve without loss the contributions of network broadcasting to the public and to the affiliated stations, while ensuring that licensees will exercise their responsibilities under the law. We believe that these regulations will foster and strengthen network broadcasting by opening up the field to competition. An open door to new networks will stimulate the old and encourage the new.

The prophecy that regulations such as we are adopting will "result in the eventual destruction of national program service" and "destroy the American system of network broadcasting" is, we believe, the exaggeration of advocacy. The practices which we find contrary to public interest were instituted to restrict competition within the broadcasting field, not to protect commercial broadcasting from competition by other types of advertising. Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing.

We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. For example, we have not dealt with the activities of the principal networks in the fields of electrical transcription and talent supply, although we recognize, as did the committee, that their activities in these fields "raise problems which vitally concern the welfare of the industry and the listening public." The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.

We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market. Radio broadcasting is a competitive industry. The Congress has so declared it in the Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations. If the industry cannot go forward on a

competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D. C.

COMMISSION ORDER IN DOCKET No. 5060.

IN THE MATTER OF THE INVESTIGATION OF CHAIN BROADCASTING

May 2, 1941

WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

3.101 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization¹ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-

¹ The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106 No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control² with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107 No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

IT IS FURTHER ORDERED, That these regulations shall become effective immediately; *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order; *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary*.

² The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

APPENDICES



APPENDIX A

ORDER INSTITUTING CHAIN BROADCASTING INVESTIGATION

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., March 18, 1938.

ORDER No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It is ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.
2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.
3. The nature and extent of network program duplication by stations serving the same area.
4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.
5. The extent to which single chains or networks have exclusive coverage in any service area.
6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.
7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.
8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.
9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.
10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.
11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.
12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It is further ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It is further ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. SLOWIE, *Secretary.*

APPENDIX B

MEMORANDUM OF SUBMITTAL ACCOMPANYING REPORT OF COMMITTEE ON CHAIN BROADCASTING, AND CONCLUSION OF THE COMMITTEE'S REPORT

[Excerpt from Committee Report dated June 12, 1940, pp. i-vf and pp. 133-138]

TO THE FEDERAL COMMUNICATIONS COMMISSION:

There is transmitted herewith the report of the Committee on chain broadcasting made pursuant to Order No. 37, authorizing an investigation to determine the necessity for and the nature of special regulations applicable to radio stations engaged in chain or other broadcasting which are required in the public interest, convenience, and necessity.

This report deals with the following subjects: The predominance of network organizations in the radio broadcast field; contractual relation of network organizations to station licensees; radio broadcasting and the supply of talent; transcription services in the radio broadcast industry; and multiple ownership of radio broadcast stations. There is attached to the report, as appendix A, an exhaustive and detailed digest of the evidence received by this Committee during the extensive hearings held by it as well as of other related material in the official files of the Commission. There is also attached, as appendix B, a report compiled by the law department entitled "Report of Persons and Other Entities Holding Stock Interest In, Control Over, or Official Relationship to More Than One Standard Broadcast Station Reported to the Federal Communications Commission to April 1, 1940."

The Committee is of the opinion that these materials form an adequate basis upon which the Commission may proceed to a consideration of the need for a revision of its licensing policy in the radio broadcast field in order to correct the serious inequities and arbitrary practices which have developed in connection with chain broadcasting:

The record discloses an unhealthy predominance of the network organizations in the radio broadcasting field which is due, in large measure, to the contractual arrangements forced upon stations seeking affiliation with a network. These contractual arrangements have resulted in a grossly inequitable relation between the networks and their outlet stations to the advantage of the networks at the expense of the outlets. These advantages have, in turn, led to further and further expansion of the networks' activities and a sharp curtailment of the scope of activity of the outlet stations.

The provisions of these contracts which forbid the outlet to accept programs from any other network, which prohibit the outlet from accepting programs from national advertisers at rates lower than those charged by the network, and which require the outlet to keep available for the use of the network all, or almost all, of its time, stifle competition and tend to make the outlet the servant of the network rather than an instrument for serving the public interest. The station is thereby rendered incapable of serving as a medium of local self-expression through the broadcast of local programs.

The onerous burden of proof placed upon the outlet when it desires to reject a commercial network program has resulted in the almost universal acceptance of all such network programs and the delegation by the licensee-outlet of its duty to operate in the public interest.

The long life of these contracts and the retention by the networks of the option of renewal, without according a like privilege to the outlet, give the chains a dominant bargaining position sufficient to enable them to dictate policies to the station licensees.

A disproportionate share of the receipts from a network broadcast is retained by the network organization under these contracts. We believe that individual and corporate licensees should be independent and successful if they are to serve fully the public interest.

It is the committee's opinion that many of the evils of chain broadcasting can be removed by the elimination of certain provisions now found in the regular network-outlet contract. The committee believes that there is authority under the statute to deal with the problems raised by these contractual arrangements. Section 303 (i) of the Communications Act of 1934 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." It is our opinion that the authority so granted by the act includes the power to make regulations governing the contracts entered into between a licensee and a network where such contracts affect the duty or ability of licensees to operate in the public interest. The power conferred by section 303 (i) is buttressed by the grant of authority contained in sections 307 (d) and 309 (a) requiring the Commission to refuse licenses or renewals thereof unless the Commission finds that public interest, convenience, or necessity would be served by granting the license or renewal. It is our opinion, based upon the extensive investigation which we have just completed, that public interest, convenience, or necessity are adversely affected by inclusion in the network-outlet contracts of many of the contractual provisions referred to above.

As the report clearly shows, the activities of the principal networks in the fields of electrical transcription and talent supply raise problems which vitally concern the welfare of the industry and the listening public. These and other network practices which have tended to restrict competition in the radio broadcast field can be eliminated or, at least, ameliorated by a redefinition of the licensing policy of the Commission. The problems in the chain broadcasting field are interdependent and closely related with one another and with the network-outlet contract. The elimination of arbitrary and inequitable contractual arrangements will tend to subject the networks to active competition and will render the independent station more secure within the industry, and better able to cope with the networks in all fields of broadcast activity.

The committee believes that the Commission should proceed at once to deal with these problems to the extent that Congress has given it authority in the Communications Act of 1934. In our opinion, the Commission possesses ample power under the Communications Act to redefine its licensing policy and require the elimination of inequitable and arbitrary contractual arrangements which affect the duty of the licensee to serve the public interest.

The committee believes that competition in the radiobroadcast field can be further enhanced by a revaluation of the so-called clear-channel policy, whereby new stations are refused access to clear channels regardless of the service which the new station would be able to render and regardless of how small the interference to the clear-channel station would be. The record evidences that all but two of the high-power clear-channel stations in the United States are on the Columbia and National networks as well as all the high-power regional stations. The exclusive grant of a clear channel to a station which can only serve limited areas prevents people in other sections of the country from receiving service from stations which could otherwise operate on the clear-channel frequency. In our opinion, the Commission should consider the wisdom, and practicability of utilizing the clear channels so that people living in all sections of the United States can have the benefit of radio reception at present denied them.

The committee desires also to direct the attention of the Commission to the following problems suggested by the report:

1. The necessity and advisability of requiring networks to be licensed by the Commission.
2. The ownership of stations by networks.
3. The ownership of more than one station by an individual or corporation.
4. The control of talent by networks.
5. The dominant position of National in the transcription field.
6. The difficulties involved in supervising the transfer of control of corporate licensees because of their stock being listed on stock exchanges.

The actual administrative experience which the Commission will obtain under its new licensing policy will enable it to suggest to the Congress the enactment of amendatory legislation to deal with these problems if such is later found to be necessary.

The committee recognizes that various benefits to the public may be achieved through the proper operation of chain broadcasting. It is the opinion of the committee that through the exercise of the powers of the Commission in dealing with the contractual relations between network and outlet, the potential ad-

vantages of the chains in this country can be retained. At the same time, the abuses which have prevented many of its potential advantages from being realized can be corrected. It is the committee's belief that the removal of arbitrary and inequitable provisions from network-outlet contracts will eliminate many of the detrimental practices involved in chain broadcasting without sacrificing any of the benefits.

By the committee.

THAD H. BROWN, *Vice Chairman.*
PAUL A. WALKER, *Commissioner.*
FREDERICK I. THOMPSON, *Commissioner.*

VI. CONCLUSION OF COMMITTEE REPORT

The record reveals at every turn the dominant position of the network organizations in the field of radio broadcasting. Of the 660 standard broadcast stations in operation during the year 1938, major networks served 350. These 350 stations included almost all of the high-power stations in the country.

In order to buttress their dominant position in the broadcast industry, the chain organizations have established the practice of owning or otherwise controlling powerful and profitable stations. During the year 1938 Columbia and National alone owned or controlled 23 such stations. The record reveals that the chains have been developed around these network owned and controlled stations and have been operated largely for the networks' benefit. The interests of the independent outlet stations, which are the real foundation of nation-wide broadcasting, have been subordinated to the interests of the network owned and controlled stations.

The problem with respect to the ownership of two or more stations by the same person or group of persons is not unlike that of network ownership of stations. The record evidences a definite trend toward concentration of ownership of radio stations. The 660 commercial stations in 1938 were owned by a total of 460 persons, both natural and corporate. Eighty-seven of these persons owned more than one station each and received in 1938 approximately 52 percent of the total business of all commercial broadcasting stations. To the extent that the ownership and control of radio-broadcast stations falls into fewer and fewer hands, whether they be network organizations or other private interests, the free dissemination of ideas and information, upon which our democracy depends, is threatened.

The predominance of network organizations is evidenced by their disproportionate share of the income of the broadcasting industry. The net operating income of all the stations and networks for the year 1938 was \$18,854,784. Of this amount, \$9,277,352 or about half of the total went to National and Columbia and their 23 owned or otherwise controlled stations. The remainder had to be divided among the 310 stations which were not on any chain and the 327 chain stations which were not owned or controlled by National and Columbia.

The predominance of network organizations is further evidenced by the fact that all but two of the 30 high-power, unlimited-time, clear-channel stations and all the high-power regional stations are on the National and Columbia networks. The inescapable conclusion is that National and Columbia, directed by a few men, hold a powerful influence over the public domain of the air and measurably control radio communication to the people of the United States. If freedom of communication is one of the precious possessions of the American people, such a condition is not thought by the committee to be in the public interest and presents inherent dangers to the welfare of a country where democratic processes prevail.

Except in those cases where a station is owned or controlled by a network, chain broadcasting is effectuated by means of contracts between the network organizations and its outlet stations. The existing contracts reveal many arbitrary and inequitable practices on the part of the networks. The provision that the outlet station cannot accept programs from any network other than the one to which it is bound by contract deprives the station of profitable business and the listening public of programs for which there is a demand. The practice of requiring stations to set aside all or a major portion of their broadcast time for the utilization of the networks, regardless of whether such time is used or not, places an undue burden upon the outlet station and lessens the ability of the station to serve the local needs of the community. The provision that nonnet-

work rates for national advertising business cannot be less than those of the network prevents the outlet station from entering into a healthy competition for advertising business. The provisions of the contract concerning the free use of the first converted hours, combined with low initial compensating rates for the next hours, result in an inequitable distribution of proceeds from network broadcasting. Whereas Columbia and National had aggregate network time sales of \$44,313,778 for 1938, they paid to the 253 independently controlled stations on their networks only \$12,267,500, approximately one-half of which was paid to 25 of these stations with a relatively strong competitive position based on the need of the networks for their particular facilities. Moreover, the contracts generally cover periods of time far in excess of the period for which the station is licensed and bind the outlet to network policies far beyond the expiration date of the license.

These arbitrary contractual arrangements are further reflected in the program policies of the network organizations. Outlet stations are required by their contracts to accept all commercial programs sent by the network organizations unless they are able to prove to the satisfaction of the networks that a particular program will not serve public interest. Since the outlet stations have only general advance knowledge of the content of the program, they have come to accept whatever the network chooses to forward to them. Furthermore, approximately 90 percent of the commercial programs sent by network organizations are produced by advertising agencies, so that the delegation of program responsibility by the licensee is carried one step further.

The record reveals a number of instances in which chains have gone even further than the regular network-outlet contract and have actually taken over the management of the station. Section 310 (b) of the Communications Act provides that licenses for radio-broadcast stations shall not be transferred or assigned unless the Commission shall decide that such transfer is in the public interest and shall give its consent thereto in writing. The Commission has already taken cognizance of this problem and is engaged in investigating these contracts.

The operation by National of two distinct networks with separate service to two stations in each of many cities is evidence of the complete domination of the licensee stations exercised by the chains through the network-outlet contract. It is also one of the most inequitable byproducts of these contracts. The contracts which stations have with National do not specify to which of its chains the outlet is to be linked. The outlet station is only informed that it is a part of the National network. By virtue of this factor, National has the power to determine the economic fate of any of its outlets by arbitrarily assigning it to the prosperous Red network or to the unprofitable Blue network. These two networks have not been operated as competing units, with the benefit of competition accruing to the outlet station and the listening public, but as two parts of the National system with advantages to National only. The dual-network system has been utilized by National to prevent competing stations and other networks from entering communities served by it.

The predominance of the network organizations is further accentuated by their activities in the talent and electrical-transcription fields. The policy of Columbia and National of placing talent under the management of and exclusive contract to a network organization has the effect of limiting the efforts of much of the best talent in the country to network programs and of arbitrarily restricting the programs of independent competing stations, as well as the communities in which they are located. In the field of electrical transcriptions the National Broadcasting Co. has become a dominant factor. It has gained great competitive advantages in this field from its position in radio broadcasting, and its transcription activities have in turn, buttressed its position in the radiobroadcast industry. Since the unrestricted utilization of electrical-transcription programs is frequently an absolute necessity for independent stations lacking affiliation with a network, National's dominant position in the electrical-transcription field endangers the ability of these stations to serve the public interest adequately.

It seems apparent that the predominance of network organizations, the perpetuation of inequitable relations between such organizations and their outlet stations, and the lack of a more active competition within the radio broadcast industry are, in large part, the result of the contractual provisions that have been described in this report. The heart of the abuses of chain broadcasting is the network-outlet contract. It is the committee's considered opinion that many of the existing inequities and arbitrary practices will find correction in the reformation of these contracts.

APPENDIX C

PROCEDURE FOR ORAL ARGUMENT ON NETWORK INQUIRY REPORT

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., November 28, 1940.

The Federal Communications Commission today announced procedure for the oral argument on the committee network inquiry report made public June 12, 1940.

The hearing is scheduled for Monday and Tuesday, December 2 and 3, in hearing room A, Interstate Commerce Commission Building, starting at 10:30 a. m.

Each party will be allowed a maximum of 1 hour of argument on the issues of fact and policy raised in the committee report. The order of argument will be as follows: National Broadcasting Co.; Columbia Broadcasting System; Independent Radio Network Affiliates, Inc.; Don Lee Broadcasting System; Mutual Broadcasting System; Roy L. Albertson (WBNY); Rock Island Broadcasting Co. (WHBF); Voice of Longview (KFRO); World Broadcasting System, Inc.; Association of Radio Transcription Producers of Hollywood, Inc.; American Federation of Musicians; Independent Artists' Representatives; Associated Music Publishers, Inc.

In order to facilitate the oral argument, counsel are requested to consider the advisability and effect of the promulgation by the Commission of the following special regulations with respect to chain broadcasting. In several instances these suggestions are in the alternative, and the Commission desires to hear argument on the advisability and effect of alternative suggestions. It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the report of the chain broadcasting committee.

1-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization.

OR

1-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization; *Provided*, That such restriction shall not apply to licensees of stations located in or rendering primary service to cities receiving adequate primary service from five or more full-time stations.

2. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization which gives the network organization an option on the hours of operation of the licensee's station for the broadcasting of commercial programs (a) for more than 30 percent of the converted hours of operation in any city receiving adequate primary service from three full-time stations with comparable facilities; (b) for more than 20 percent of the converted hours of operation in any city receiving adequate primary service from two full-time stations with comparable facilities; (c) for more than 10 percent of the converted hours of operation in any city receiving adequate primary service from one full-time station; (d) for a total number of converted hours exceeding by more than 25 percent the converted hours during which such licensee has broadcast commercial programs transmitted to the licensee by the network organization during the 6 months preceding the effective date of the contract.

3-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization, the terms of which exceed in duration the effective period of the license granted by this Commission. For the purposes of this section, an agreement shall be considered as exceeding in duration the effective period of the license if the agreement gives either party an option to extend the contract beyond the termination of the license; *Provided*, That this restriction shall not be construed as preventing a licensee from entering into a contract with a network organization a reasonable period of time, not to exceed 30 days, in advance of the expiration date of the existing contract.

OR

3-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which gives the network organization any rights with respect to the renewal or cancellation of such contractual arrangement not given to the licensee.

OR

3-C. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization for a period longer than 2 years.

4. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which controls, restrains, limits, or in any other way interferes with the establishment of the rates to be charged by the licensee for the sale of available broadcast time to advertisers or other clients.

5. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which has the effect of or will result in the broadcasting of the programs of one network company by two or more standard broadcast stations rendering adequate primary service to the same city.

6-A. After January 1, 1942, no licensee of a standard broadcast station shall, directly or indirectly, own or be owned by, or be under common control with or have any interests in a chain or network organization; *Provided*, That the Commission will grant reasonable extensions of time in the event that the licensee is unable to meet the requirements of this restriction before its effective date.

OR

6-B. No person engaged in network broadcasting shall be licensed to operate more than two clear channel stations or more than three standard broadcast stations of all classes.

OR

6-C. No person engaged in network broadcasting shall be licensed to operate any standard broadcast station located in a city receiving adequate primary service from less than five full time standard broadcast stations.

7. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, which prevents the licensee from rejecting, for reasonable cause, any program offered by the network organization. The contracts between station licensees and network organizations shall expressly guarantee the right of program rejection by the licensee, and the judgment of such licensee shall be *prima facie* evidence of the reasonableness of rejection claims.

APPENDIX D

REGIONAL NETWORKS

The regional network field has been in a state of more rapid change than the national network field. Since the time of the Committee hearings, some regional networks have become defunct, and new ones have sprung up. Among the latter, for example, are the Carolina Broadcasting System, associated with Mutual; the Intermountain Network, associated with Mutual; the Minnesota Radio Network, associated with NBC; the Southern Network, associated with Mutual; and many others.¹ The summary which follows, accordingly, is not an exhaustive survey of regional networks, but rather a résumé of information concerning regional networks as developed in the record of this proceeding.

A. California Radio System

The California Radio System was formed November 21, 1936, to engage in network operations. It was originally operated by a partnership composed of McClatchy Broadcasting Co., wholly owned by McClatchy Newspapers, on the one hand, and Hearst Radio, Inc., and the Evening Herald Publishing Co., both controlled by William Randolph Hearst, on the other. The following stations composed the original network:

Station	Location	Owner
KEHE	Los Angeles	Evening Herald Publishing Co.
KYA	San Francisco	Hearst Radio, Inc.
KFBK	Sacramento	McClatchy Broadcasting Co.
KERN	Bakersfield	Do.
KMJ	Fresno	Do.
KWG	Stockton	Do.

The Hearst interests withdrew from the partnership in November 1937, and the McClatchy Broadcasting Co. acquired sole control of the network and operated it as one of its departments. Station KYA remained on the network under a contract of affiliation and the other Hearst station, KEHE, was replaced by KFWB in Hollywood. Subsequently, stations KFOX in Long Beach, KTMS in Santa Barbara, and KOH in Reno, Nev., were added to the network. Station KOH is owned by The Bee, Inc., a wholly owned subsidiary of McClatchy Newspapers.

The typical affiliation contract of the California Radio System, as of the time of the committee hearings, provided that the network should have free use of the affiliate's facilities for network commercial programs for 150 hours per year (not more than the equivalent of 3½ nighttime hours per week) and that the network should pay the station 50 percent of its rate for hours used in excess of the free time. The outlet placed all its time at the disposal of the network subject to 15 days' notice, except that the station could retain three daytime hours per day, which, however, were not specified. The station could freely reject any network sustaining program, but it was required by contract to accept network commercial programs subject only to the optional-time provisions. The contract had no date of termination, but either party could cancel on 6 months' notice.

California Radio System was not a contract outlet for any other network; but as of the time of the Committee hearings the four stations owned by McClatchy Broadcasting Co. and station KTMS served, individually, as contract outlets for NBC, and KOH was affiliated on an individual basis with CBS.

The net time sales of the network for 1938, after agency commissions, amounted to \$109,848, of which \$88,027 was paid to its four owned stations and \$21,821 to the other five stations on the network.

¹ Broadcasting, *1941 Year Book*, pp. 308-309.

B.—Yankee and Colonial Networks

The Yankee Network, Inc., was incorporated on April 12, 1930, as The Shepard Broadcasting Service, Inc.; its present name was adopted in December 1936. It is owned by John Shepard, Jr., through a holding company, the Winterstreet Corporation.

Colonial Network, Inc., was organized August 5, 1936. Its stock is divided equally between John Shepard III, president of Yankee, and his brother, Robert F. Shepard. At the end of 1938, 13 stations were affiliated with both Yankee and Colonial, 4 others were affiliated with Yankee only and 1 other with Colonial only. The reason for forming Colonial was to make full use of, the 16-hour telephone circuit for which Yankee had contracted but which it was using only part of the time. Colonial was permitted to use the Yankee circuits whenever they were not being used by Yankee and was not charged for their use except when connection was made with an outlet station affiliated with Colonial but not with Yankee. The circuits were used by Yankee approximately 5 of the 16 hours per day and by Colonial the remaining 11.

At the end of 1938 the following stations, all but three independently owned, comprised the Yankee Network:

WNAC, Boston.*
WEAN, Providence.*
WICC, Bridgeport.*
WLBZ, Bangor.
WNBH, New Bedford.
WFEA, Manchester.
WLLH, Lowell-Lawrence, Mass.
WSAR, Fall River.
WRDO, Augusta, Maine.

WTIC, Hartford.
WTAG, Worcester.
WCSH, Portland, Maine.
WLNH, Laconia, N. H.
WNLC, New London.
WHA1, Greenfield.
WCOU, Lewiston-Auburn, Maine.
WATR, Waterbury.

*Owned by Yankee.

The Colonial Network was composed of the above stations (except WNAC, WTIC, WTAG, and WCSH) and in addition Station WAAB in Boston, owned by Yankee. Station WNAC was the key station of the Yankee Network and Station WAAB was the key station of the Colonial Network.

Yankee as a network did not carry the programs of any national network, but nine of its outlets (WNAC, WEAN, WICC, WCSH, WTIC, WTAG, WFEA, WLBZ, and WRDO) were individually affiliated with NBC in 1938. Colonial, on the other hand, was associated with Mutual on a network basis as a "participating member."

The network-outlet contracts used by Yankee and Colonial were, as a general practice, in the form of three-party agreements between the station licensees and both networks. They followed a more or less standard form which was varied in individual cases, particularly with respect to the amount of time under option to the networks, the compensation of the stations, the payment of telephone wire charges, and the amount of free time given to the networks.

The affiliation was not for a fixed term, but could be terminated by either station or network on 12 months' notice.

Yankee and Colonial took options on a substantial number of specified hours of most of their outlets; for seven stations, at the end of 1938, the option covered the entire broadcast day. The outlets agreed to broadcast, upon 28 days' notice, all network commercial programs offered during the time included within the option except those which, in the opinion of the station, were against public interest, convenience, or necessity.

Yankee and Colonial compensated their outlets for broadcasting commercial programs at a specified rate, generally 30 percent of the network rate for the station. In some instances, stations gave the networks a certain amount of free time, varying from 1 to 3 hours per week. Stations were permitted to broadcast all available network sustaining programs without additional charge.

Most of the stations were bound by an exclusivity clause which read:

"The station agrees not to accept programs directly from any other network other than Yankee or Colonial without permission in writing from Yankee or Colonial, but will accept programs originating with other networks if fed to them by Yankee or Colonial."

Yankee and Colonial granted territorial exclusivity to their outlets as a matter of practice, but not as a matter of contractual right.

² In 1940 Colonial became one of the stockholder owners of Mutual.

³ It should be noted, however, that, as of the end of 1938, 9 Yankee outlets were affiliated also with NBC, apparently with the permission of Yankee.

The Yankee Network maintained a news service which gathered and edited news, an artists' bureau, and a weather service department in connection with weather forecasting for New England, New York, and Long Island.

The network net time sales of Yankee for 1938 amounted to \$564,225, of which Yankee retained \$428,434 (76 percent) and paid \$136,791 (24 percent) to 13 contract outlets.

Colonial had network net time sales for 1938 of \$190,758, of which it retained \$114,764 (60 percent) and paid \$53,680 (28 percent) to 3 Yankee-owned stations (WAAB, WEAN, and WICC) and \$22,314 (12 percent) to its other outlets. Of those net time sales, \$49,422 (26 percent) was derived from Colonial programs and \$14,236 (74 percent) from Mutual programs.

C. Don Lee Broadcasting System

The Don Lee network was founded in December 1928 by Don Lee, Inc., a corporation engaged principally in selling automobiles, when it connected its two owned stations (KFRC in San Francisco and KHJ in Los Angeles) by a telephone circuit for chain broadcasting. During that month the three stations owned by McClatchy newspapers (KMJ in Fresno, KWG in Stockton, and KFBK in Sacramento) joined the Don Lee Network, and after November 14, 1930, when McClatchy newspapers acquired Station KERN at Bakersfield, that station became affiliated with Don Lee. In 1933 Station KOH, at Reno, also owned by McClatchy newspapers, joined Don Lee.

In September 1929 Don Lee, Inc., became the CBS representative on the Pacific coast and furnished its outlets with CBS programs. Don Lee, Inc., expanded its network coverage of the Pacific coast in 1932 by adding Stations KOIN in Portland, KOL in Seattle, KVI in Tacoma, and KFPY in Spokane as contract outlets. In May 1931, Don Lee, Inc., acquired control of Station KDB in Santa Barbara and the ownership of Station KGB in San Diego and both of those stations became Don Lee, Inc., operated stations, serving also as outlets for CBS.

Don Lee's relationships with McClatchy newspapers and CBS continued until December 1936, when the five stations owned by the McClatchy interests left Don Lee to become associated with NBC and California Radio. CBS at the same time terminated its affiliation with Don Lee and established its own operations on the Pacific coast, taking over directly the contracts with four stations previously associated with Don Lee (KOIN, KOL, KVI, and KFPY). Don Lee thereupon became a "participating member" of Mutual and transmitted Mutual programs to its outlets.*

Since June 1932, network operations and the ownership of Stations KFRC, KHJ, and KGB have been vested in the Don Lee Broadcasting System, a wholly-owned subsidiary of Don Lee Holding Co., which in turn is wholly owned by the estate of Don Lee (deceased). The estate also controlled Station KDB in Santa Barbara through ownership of all the stock of its licensee.

Don Lee System expanded beyond California into the Pacific Northwest in the fall of 1937 through a contract with Pacific Broadcasting Co. During 1938 the Don Lee System was composed of 28 outlets. Fourteen of these, located in Washington and Oregon, received Don Lee network service through Pacific. Of the other 14, all located in California, 11 served the Don Lee System under direct contracts and the other 3 were owned by the system. One of the stations under direct contract (KDB), moreover, was under common ownership with the Don Lee System.

Don Lee System furnished its outlets with 16 hours of commercial and sustaining programs daily. From 16 to 20 percent of the Don Lee commercial programs were received from Mutual and the balance were furnished by Don Lee. The outlet stations of the Don Lee System had no direct contractual relations with Mutual; they received Mutual programs only through the facilities of Don Lee. Indeed, Mutual offered service to Pacific coast stations only through Don Lee.

The typical Don Lee affiliation contract, as of the time of the committee hearings, was for a specified term, with three additional terms of 1 year each, provided both parties gave notice to extend 90 days prior to expiration. The contract with Pacific Broadcasting Co., however, was for 5 years, but either party could terminate at the end of any year if the net income of Pacific from network business did not equal the cost of telephone lines.

The stations optioned all their time to Don Lee for network commercial programs. They were not required, however, to take any network programs which

* In 1940 Don Lee became one of the stockholder owners of Mutual.

would interfere with any local program of major public interest, convenience, and necessity.

Don Lee was generally entitled to free time over its outlet stations not exceeding 2 hours per week. For commercial time in excess of the free time, Don Lee paid the California stations with which it had individual affiliation contracts specified percentages of their network rates. The arrangement with Pacific was different. The latter network paid telephone-circuit expenses north of San Francisco and received all revenue collected by Don Lee from advertisers for the use of Pacific facilities until these expenses were covered. Thereafter it received from Don Lee 85 percent of such net revenue. Don Lee supplied sustaining programs to its outlets at no additional charge.

The affiliates agreed not to permit the use of their facilities by any other broadcasting company, system, or network, and, in turn, Don Lee agreed not to send its programs to other stations located in the same city as any of its outlets, or to any stations in Oregon or Washington other than the outlets of the Pacific Broadcasting Co.

The net time sales, after agency commissions, of Don Lee System and its 4 controlled stations for 1938 were \$553,333, of which \$417,324 was derived from Don Lee network time, \$129,753 from Mutual network time, and \$306,256 from nonnetwork sales of the 4 stations. The 28 stations composing the network during 1938 received \$651,352 from networks, of which \$547,077 (84 percent) went to the 4 Don Lee owned stations and \$104,275 (16 percent) to the 24 independently owned outlets.

D. Pacific Broadcasting Co.

The Pacific Broadcasting Co. was incorporated in October 1937, after the Don Lee System became an outlet for Mutual, for the purpose of establishing further outlets for Mutual and Don Lee programs among a group of stations in Oregon and Washington.

The three shareholders of Pacific had interests in six stations in Washington and Oregon,* four of these (KMO, KIT, KOL, and KGY) became Pacific network outlets. The other two, KHQ and KGA* in Spokane, remained outlets for NBC.

During 1938 Pacific had 14 outlets: 9 in Washington and 5 in Oregon.

Pacific had no studio or other program production facilities. It relied in the main upon Mutual and Don Lee and to a lesser extent upon its contract outlets for network programs.

By contract with Don Lee, Pacific had the exclusive right to transmit Mutual and Don Lee programs in Oregon and Washington, and it agreed not to carry the programs of any network other than Don Lee and Mutual. By using the programs made available to it by Don Lee, Mutual, or its outlets, Pacific supplied its network with 16 hours of programs daily. The typical affiliation contract between Pacific and its outlets, as of the time of the committee hearings, required the station, upon 10 days' notice, to accept network commercial programs during any period of the broadcast day, except that the station was not required to take any program which would interfere with any locally originated program of major public interest or public necessity. The term of the contract was for 1 year, but Pacific had an option to extend for 4 additional terms.

Pacific contracted for and paid the telephone circuit expenses of its main line, including the line to the Don Lee System at San Francisco. The stations paid the telephone wire charges for circuits connecting them with Pacific main circuits. The outlets agreed to give Pacific 7 nighttime hours of free time per

* See the following table:

Name	Station	Percent of ownership
Carl E. Haymond	KMO, Tacoma	99.
Louis Wasmer	KIT, Yakima	100.
	KHQ, Spokane	99.
	KOL, Seattle	42.
	KGY, Olympia	49 1/2.
	KGA, Spokane	(Lessee and licensee, owned by NBC.)
Archie G. Taft	KOL, Seattle	48 2/3.
	KGY, Olympia	49.

* While not a Pacific contract station, KGA acted as a Pacific network outlet for certain commercial programs.

week (or their equivalent) for network commercial programs and 2 additional free hours at any time for network promotional programs. For all time used for commercial programs, in excess of the free time, Pacific paid its outlets specified rates. Sustaining programs were available to outlet stations at no additional charge.

The stations agreed not to permit any other broadcasting company, system, or network to use its facilities; and Pacific agreed not to send its programs to any other station in the same city.

The total net time sales, after agency commissions, of the 14 outlets of Pacific for 1938 amounted to \$580,002, of which \$36,468 (6 percent) was received from Pacific, the remainder being nonnetwork net time sales.

E. Michigan Radio Network

Michigan Radio Network was established on January 1, 1933, as an operating department of King-Trendle Broadcasting Corporation. King-Trendle had been incorporated on April 25, 1930, by John H. King and George W. Trendle, who had previously been engaged in the operation of motion picture and vaudeville theaters. On May 7, 1930, King-Trendle purchased station WXYZ in Detroit; on March 24, 1931, it leased station WOOD at Grand Rapids; and on December 21, 1931, it leased station WASH at Grand Rapids, which had been sharing time with WOOD. Thereafter, King-Trendle operated the two stations in Grand Rapids as one station, WOOD-WASH.

Michigan Radio Network furnished programs from station WXYZ in Detroit to its contract outlets within the State of Michigan. From 1933 to the date of the Committee hearings the following stations were affiliated with the network:

WXYZ, Detroit;
WOOD-WASH, Grand Rapids.
WIBM, Jackson
WFDF, Flint

WELL, Battle Creek.
WKZO, Kalamazoo.
WBCM, Bay City.
WJIM*, Lansing.

*Joined network July 1, 1934.

On September 29, 1934, station WXYZ became one of the original four "member" stations of Mutual; but the station withdrew from Mutual on September 29, 1935, to join NBC's basic Blue Network. The NBC affiliation contract provided that King-Trendle might furnish to the stations on the Michigan network NBC's commercial programs sent to WXYZ, and also the sustaining programs, except the "Music Appreciation Hour" conducted by Walter Damrosch, the program on Sundays at noon, and all speeches but those by the President of the United States. At the same time, station WOOD-WASH became affiliated with NBC as an optional station.

The standard affiliation contract between Michigan Network and its outlets, as of the time of the committee hearings, was for a term of 1 year, but it could be canceled if a majority of all stations on the network and the network agreed.

The contract provided that the outlet, upon 2 weeks' notice, must accept any network commercial program offered during any hour of the broadcast day, except programs the broadcasting of which would not be in the public interest, convenience, and necessity. The station was permitted to reserve for itself not more than one and one-half hours each evening between 6 p. m. and 10 p. m. for local broadcasting, provided that such periods did not conflict with network commercial programs offered.

The outlet granted the network 1 hour per day before 6 p. m. and 1 hour after 6 p. m. which the network could sell commercially and for which the outlets did not receive compensation. For time used commercially by the network in excess of the 2 free hours per day, the station was paid a specified rate. Michigan Network paid telephone circuit expenses and supplied sustaining programs without additional charge.

The contract provided that the station would not permit the use of its facilities by any other broadcasting chain or network; and the station also agreed not to sell time to third persons at a rate less than that specified in its contract with Michigan Network.

The hours of commercial programs sent to its outlets by Michigan Network did not, as a rule, exceed the number of free hours given to the network. More than one-half of all programs sent to its outlets by Michigan radio were those received from NBC.

* This company was originally incorporated under the name of Kunsky-Trendle Broadcasting Corporation. Its name was changed to King-Trendle Broadcasting Corporation in 1936.

The network time sales of Michigan Network for 1938 amounted to \$133,314, of which \$83,853 (62.5 percent) was paid to its three controlled stations and \$49,461 (37.5 percent) was paid to its six contract outlets, whose total net time sales amounted to \$288,238. The net time sales of the three stations operated by Michigan Network amounted to \$651,645 for 1938, of which \$113,203 was received from NBC.

In 1938 King-Tondle entered into an agreement with NBC's transcription bureau whereby NBC transcribed Michigan's Lone Ranger program, and leased the transcriptions to stations throughout the world except specified major trade markets in which Michigan Network reserved the right to lease the transcriptions.

F. Texas State Network

Texas State Network was incorporated on August 1, 1938, to render program service to stations within the State of Texas and to provide a state-wide advertising medium. Network operation commenced September 15, 1938.

At the time of the committee hearings, Texas State had 23 outlets, all independently owned. One (KPLT at Paris) was operated by Texas State under a management contract; the remaining 22 served as contract outlets. Four of the stations also served as outlets for NBC and one for CBS.

Texas State was an "affiliate" of Mutual and furnished Mutual programs to its outlets.

The standard Texas State affiliation contract was for 1 year, with an automatic extension for a period of 2 more years unless the network or the outlet gave notice to the contrary. The outlet agreed, upon 28 days' notice, to carry network commercial programs at any time during the 7 specific hours⁶ optioned to the network, except that, because of "its public responsibility," it could reject a network program, the broadcasting of which would not be in the public interest, convenience, and necessity.

The network agreed to provide the outlet with 17 hours of live talent programs per day. There was no particular charge specifically allocated to sustaining programs; but most of the outlets agreed to pay Texas State \$500 per month in consideration of network affiliation; a few paid somewhat less. In addition, each station gave Texas State 5 unit hours each week free for network commercial programs. Texas State maintained network telephone lines at its own expense and paid each outlet the station card rate less agency commission of 15 percent and less a network selling commission of 15 percent, for network commercial programs, in excess of the free time.

The contract contained a provision, similar to the provision in the standard NBC affiliation contract, which gave the network the right to reduce station compensation if the station sold time to advertisers at rates lower than those charged by the network. It also prohibited a station from altering its network station rate or station card rate without the consent of the network and its outlet stations.

The net times sales, less agency commissions, of Texas State for the period from September 15, 1938, to January 31, 1939, amounted to \$79,468, of which \$47,335 (59 percent) was paid to its outlets. During this period Texas State collected \$37,082 from its outlets under the arrangement whereby the stations agreed to pay the network \$500 per month. That amount represented approximately 120 percent of the amount Texas State paid to the stations.

G. Arrowhead Network

Arrowhead Network is a trade name given by Head of the Lakes Broadcasting Co. to its three owned stations located in northern Minnesota, a section known locally as the "Arrowhead" area. The stations were WEBC in Duluth, WHLB in Virginia, Minn., and WMFG in Hibbing.

The three stations were under one ownership and were interconnected for mutual program-service purposes, the entire benefits of which inured to the owner. For 1938 the net time sales, after agency commissions, of the three stations were \$239,276.

⁶ 7:30 a. m. to 9:30 a. m.; 11:30 a. m. to 1:30 p. m.; 5:30 p. m. to 7:30 p. m.; and 9:00 p. m. to 10:00 p. m. Four outlets of Texas State were also affiliated with NBC. Since their arrangements with Texas State were subordinated to their relationship with NBC the standard Texas State affiliation contract was modified, particularly with respect to its optional time provision, to apply to them.

H. Empire State Network, Inc.

Empire State Network, Inc., was incorporated on September 23, 1938, and ceased operations on November 7, 1938. During its 43 days of operation it sold time principally for political speeches.

The stations affiliated with the network were:

WABY, Albany.
WIBX, Utica.
WSAY, Rochester.
WMBO, Auburn.

WBNY, Buffalo.
WBNF, Binghamton.
WHN, New York.

Most of the stations granted the network 2 hours of free time per week and received from the network 30 percent of the revenue from sales over their facilities. The total revenue of the network for its 43 days of existence was \$12,927.

I. Inter-City Broadcasting System

Inter-City Broadcasting System is a trade name selected in 1935 when the owners of stations WMCA in New York and WIP in Philadelphia agreed to exchange their programs by the use of telephone circuits. Subsequently, other stations joined the group, which was connected by permanent telephone lines for the entire broadcast day of 16 hours. The stations which served as outlets for this program service were:

WMCA, New York.
WPRO, Providence.*
WMEX, Boston.
WLAW, Lawrence, Mass.
WIP, Philadelphia.

WDEL, Wilmington.
WGAI, Lancaster.
WCBM, Baltimore.
WORK, York.
WOL, Washington.†

*Affiliated with CBS; broadcast only occasional Inter-City programs.

†Affiliated with Mutual; broadcast only occasional Inter-City programs.

Station WMCA had contracts with each of the outlet stations and served as selling agency for the group. It made all contracts with advertisers for programs produced in its studios and did the billing for all the stations. The charges to advertisers for network services were the station rates of the individual stations from which WMCA retained, as its commission, an amount ranging between 10 and 15 percent of the billing. Each station except WPRO and WOL was required to clear unsold time for Inter-City commercial programs.

J. Pennsylvania Network

Pennsylvania Network was formed during 1938 as a means of providing revenue from selling the time of a group of stations in Pennsylvania to political parties, and it ceased operations with the conclusion of the political campaign of 1938.

Station WCAU in Philadelphia acted as selling agent for the group. There were no affiliation contracts; sales in each instance were subject to acceptance by the stations; and revenue and the expense of telephone circuits (which were provided for temporary periods) were shared *pro rata* by the stations.

K. Texas Quality Network

Texas Quality Network, a cooperative sales group, was formed in September 1934. The network was not a corporation and had no headquarters nor employees.

The stations affiliated with the network were:

WFAA, Dallas
WBAP, Fort Worth } share time.
KPRC, Houston.
WOAI, San Antonio.

Since each station in the group was under a separate affiliation contract with NBC, Texas Quality programs were contracted for only at hours which did not conflict with NBC programs.

The relations between the stations affiliated with Texas Quality were rather loose. Any station could terminate its membership in the network on 2 weeks' notice. Each station acted as sales agent for the group, soliciting business at a

price equal to the sum of the rates of the stations plus the telephone circuit cost involved. Sales were subject to acceptance by each of the stations in the group in every instance. Contracts were made by advertisers directly with each of the stations; but the soliciting station billed the advertisers and distributed the proceeds pro rata to the other stations after deducting agency commissions, its own commission, and time charges, and telephone expenses. The network kept no books except a record of telephone line expenses, maintained at Station WFAA, which amounted to \$2,600 monthly.

L. Virginia Broadcasting System, Inc.

Virginia Broadcasting System, Inc., was incorporated on February 1, 1936. Its stock was owned in equal shares by the owners of the following five stations in the State of Virginia, which comprised the network:

WRNL, Richmond.

WBTM, Danville.

WCHV, Charlottesville.

WGH, Newport News.

WLVA, Lynchburg.

There were no written affiliation contracts. Each station acted as sales agent for the group, soliciting business at a price equal to the sum of the rates of the stations to be used, and the sales were subject to acceptance by the individual stations in each instance. The soliciting station furnished the program service, billed the advertiser for the service furnished by the group, and distributed the proceeds to the other stations after deducting its own time charges.

For the first 3 months of operation the group was permanently connected with a telephone circuit for 16 hours per day. That service was abandoned in May 1936 because of the expense involved, and since that time the network has existed only for the purpose of broadcasting special events.

Additional Views of
COMMISSIONERS T. A. M. CRAVEN
AND NORMAN S. CASE
IN THE MATTER OF CHAIN BROADCASTING
(COMMISSION ORDER No. 37—DOCKET No. 5060)

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ADDITIONAL VIEWS OF COMMISSIONERS T. A. M. CRAVEN AND NORMAN S. CASE

I. GENERAL

All members of the Commission recognize that improvements in the present broadcast service as well as in the organization thereof are not only possible but also desirable. However, the minority disagrees with the proposals which the majority has adopted as a method of securing improvements. We fear that the proposals of the majority will result inevitably in impaired efficiency of the existing broadcast organization of the country. This system has been developed as a result of practical experience over a period of years. In the main it is operating very well in the public interest. Undoubtedly it provides the public with the best broadcasting service in the world. Naturally, there are faults which may need correction. However, some of the corrective processes suggested by the majority may easily result in faults which are far more basic than the known defects which exist today. Furthermore, it appears that insufficient recognition is given to the practical considerations which are inherent in the American system of broadcasting and which cannot be circumvented. It seems that no weight is given to the fact that broadcasting is dynamic and not static. No consideration seems to be given to the probable effect of new developments. Also inadequate recognition is given to the effect of the natural and economic limitations within which broadcasting must operate. Likewise, inadequate recognition is given to the natural laws which influence basically the manner in which broadcasting renders a social service to the public of America.

No member of the Commission condones any form of monopoly which concentrates power contrary to the public interest or which constitutes unreasonable restraint of competition. However, the majority appears to suggest that "unlimited" competition is the most important factor in securing improvements in radio broadcasting service and proposes to issue regulations the effect of which will prohibit certain contracts which now exist between chain companies and their affiliates. The intent of these regulations is to ban all arrangements which limit the ability of any broadcast station licensee to engage at any time in any and all forms of competition. While the minority insists upon competition they suggest the principle of "Free competition accompanied by good radio service to the public" rather than competition which affects adversely program service.

The minority is of the opinion that the most important problem confronting the Commission may be stated briefly as follows:

Considering the necessity of a balanced radio broadcast service of interest to and in the interest of the public, and recognizing the

natural limitations inherent in radio, how can greater equality of opportunity be extended to persons desiring to utilize radio as a media of broadcasting information to the public?

The solution of the problem requires a broad viewpoint as well as a balanced consideration of at least all of the following factors which among others contribute to broadcast service in the interest of the public:

1. The establishment of a "free radio" insofar as is practicable within inherent natural limitations.
2. Good programs.
3. An equitable distribution of facilities to states and communities.
4. Diversification of control of radio stations among many licensees.
5. Competition.
6. Efficiency of program distribution to the nation as a whole.
7. Operation of each station in the public interest rather than for the private interest of the licensee.
8. Natural economic laws of supply and demand.
9. Principles of sound business.

A limited approach, or conclusions based upon over-emphasis of one phase of the problem, will result in unsound administration and unfortunate consequences to the radio service to which the public is entitled. More specifically, we fear that the revolutionary change proposed by the majority will result in the destruction of the present excellent national program distribution system and the substitution thereof of some new kind of system, the effects of which the majority does not adequately visualize.

It is axiomatic that unlimited availability of the few existing radio facilities and efficient national program distribution cannot both be attained at the same time. There is no open market condition in the business of broadcasting as in other businesses. Nature has determined that. To attempt to circumvent these basic economic laws is fraught with peril to an industry which has hitherto achieved a marked degree of success. Regulation in disregard of economic laws may foster a situation in which competition among competently managed networks would be replaced by an unwholesome conglomeration of opportunistic "time brokers" catering to an aggregation of local monopolies in the various towns and cities of the nation. This will result in—

(1) Responsibility for carrying sustaining programs of public importance would be so diffused that such service would likely become nobody's business and the difficulty in clearing time on a national network would become an almost insurmountable task.

(2) The incentive would be removed for the origination of such sustaining features as the European war broadcasts, the American Farm and Home Hour, the Town Meeting of the Air, Toscanini, etc. If the proposals of the majority are enforced there can be no logical determination of who will pay for such service or how it will be developed.

These considerations and other far-reaching adjustments that would be involved would plunge the American broadcasting system from the *known* of good public service to the *unknown* in which all the consequences cannot be foreseen. It is, therefore, no exaggeration to predict that the decision of the majority instead of resulting in "free

competition", would more likely create "anarchy" or a kind of business chaos in which the service to the public would suffer.

The majority appears to conclude that it is necessary to exert control over certain business policies of radio station licensees in much the same manner as has been proven suitable for public utilities other than radio. However, in arriving at this conclusion there appears to have been no weighing of the advantages and the disadvantages of the present broadcast structure in terms of good program service to the public. Hence, no conclusions based upon evidence in the record have been made of the reasonableness of the present practices of the industry. For 14 years, existing contract arrangements have been enforced both through formal and informal agreements, and broadcasting in America has achieved greater progress than in any country in the world. The record does not disclose that there is *unreasonable* restraint of competition resulting from certain contracts which the majority proposes to prohibit.

It is possible that the majority in its desire to regulate one facet of the broadcast problem has overlooked some of the other important considerations and hence may have made impossible the attainment of an ideal objective. For example, in asserting jurisdiction to regulate the business practices of broadcast station licensees the majority may have assumed certain power which is not delegated to it under the law. In broadcasting, Congress evidently intended to apply the constitutional doctrine of a "free press". In so doing, Congress recognized that the advantages of a "free radio" were more important than the advantages of the type of regulation heretofore considered necessary in the public utility field. As evidence of their intent, Congress specified that radio broadcasting should not be classed as a common carrier even though licensed by the Government to operate as a form of monopoly in the public domain. The type of regulation specified by Congress for broadcasting clearly envisioned that the Communications Commission should not regulate the programs, the business practices or business policies of broadcast station licensees. Congress specified a type of regulation designed to maintain its policy of a "free radio". This type of regulation differs from that applied to other private business operations in the public domain.

Thus, the question of the power of the Commission to regulate the business phases of broadcasting may be approached from the standpoint of public interest. Congress required that radio, like the press, ~~not~~ be free from those restraints of Government which hamper free expression and which control what may be said or who may speak. The most important function of Government should be to facilitate the attainment of a "free radio". Therefore, it may be argued that if the licensing authority interferes with the business practices of persons engaged in broadcasting, there is concentrated in a single Government agency a power which must lead inevitably to undesirable restraints upon a "free radio". Such concentration of power in Government is just as contrary to public interest as the concentration of control of broadcast stations among a limited number of licensees.

It is obvious that if all the stations in the country were licensed to one person, that person, even though regulated by the Government, would have vast power to control an important media of information.

Even though such person had the best of intentions for the welfare of the public, his would be the sole judgment which determined how radio would be utilized to influence public opinion. Such an extreme is unthinkable. On the other hand, if we had innumerable licensees and therefore innumerable competitive judgments, all under the autocratic regulatory supervision of a single Government agency vested with final and unrestrained power of life and death over the economic destinies of each licensee, we likewise would have an intolerable situation, however well-intentioned such Government agency may be. It was for this reason that Congress provided not only for a diversification of control of radio broadcasting among licensees, but also for diversification of jurisdiction among various regulatory agencies of Government. It was not intended by Congress that any licensee merely because he was a radio broadcaster should be exempt from the application of laws directed to business enterprise generally. The Department of Justice and the Federal Trade Commission as well as other Government agencies include broadcasters within their jurisdiction when administering the laws relating to all business enterprise. Congress empowered the Communications Commission to regulate only that phase of radio operation which relates to licensing stations. This embraces a fair and equitable distribution of radio facilities to states, communities and persons in a manner which insures diversification of control among many licensees, as well as a good program service of interest to and in the interest of the public. It likewise includes the regulation of technical aspects of operating stations and certain other phases of radio operation affecting public interest which are not under the jurisdiction of other agencies of Government. The Commission is charged with the responsibility of determining the qualifications of licensees to operate radio broadcast stations, but the Commission does not have responsibility to determine the guilt of licensees for violations of law, the administration of which is not under the direct jurisdiction of the Communications Commission. If licensees of radio stations are found guilty of violation of such other laws, the Commission's responsibility in the premises rests solely as to the qualifications of such licensees to operate stations in the interest of the public.

If some form of monopoly exists in radio broadcasting which is contrary to the best interests of the public, it should be remembered that the Commission has licensed all broadcasting stations in the United States after finding time and time again that each of the licensees was operating his station in the public interest. Therefore, if the Commission has erred in the past, it can now correct the mistake by exercising in individual cases the licensing power delegated to it under the Communications Act of 1934.

The Commission should encourage the organization of independent, highly competitive national networks. However, if there are limitations or barriers to the establishment of additional competitive networks, the Commission need not and should not promulgate rules the effect of which would destroy all existing systems, merely to provide some other private enterprise with an opportunity to capture the revenues of broadcasting. There are better ways to encourage and secure additional competition.

II. DISCUSSION OF CERTAIN IMPORTANT FACTORS

(A) CONFLICTING TRENDS

The current scarcity of channels to accommodate the demands therefor imposes a severe limitation to freedom of action in solving some basic problems. This limitation forces a choice among conflicting trends. Some advocates of changes in the operation or of regulation of broadcasting fail to consider the inevitable results of this natural limitation. Consequently, needless misconceptions arise, as well as suggestions of panaceas which cannot solve the problem in any practical manner. Furthermore, some are prone to accept current conditions in broadcasting as static, in spite of the fact that the technical and performance bases are dynamic. None can prophesy the future of technical progress. Therefore, misconceptions of basic factors are hazardous and may tomorrow constitute artificial barriers to the very improvements which today appear desirable.

The more important conflicting trends in the dynamic field of broadcasting include:

(1) Inhibitions against patterns of centralized operation conflict with efficient program distribution on a national scale. There is a temptation to over-emphasize local interest to the detriment of national interest, and vice versa. The real goal should be efficiency of service from a national standpoint rather than a vague objective which fosters a conglomeration of local units uncoordinated for rendering a truly national service.

(2) A broadcasting station is licensed to render a public service as contrasted to a private service, even though it is operated by private enterprise for profit. Licensees naturally emphasize their rights under a license and are under continuous economic pressure to broadcast programs that will win and hold listeners. Persons in Government, on the other hand, assert that licensees do not discharge all the responsibilities which are necessary to operate a station in the interest of the public, particularly with respect to affording opportunity for balanced presentations of debatable social questions.

There cannot be sufficient facilities, nor is there sufficient time for everyone to use a broadcasting station to express to the public particular social or economic philosophies. It is essential, therefore, that broadcast licensees exercise wise judgment as to the desires of the listening audience and in choosing the speakers who may appear before the microphone.

It is equally important that Government should not undertake to impose in advance any standards in this field. Such course is fraught with such obvious peril that further discussion is unnecessary.

The best method of judging whether a licensee has utilized his facilities in the interest of the public is to examine the manner in which the station has operated, and then determine whether the judgments exercised meet a rational test of public interest.

(3) The hours of a broadcast day automatically limit the number of persons who can use facilities. Therefore, the greater the num-

ber of stations in any community the broader the opportunity for all desiring to use such facilities. However, as the number of stations in a community of any given purchasing power increases, the revenues available are diluted. If there are too many stations the quality of service rendered by each may be affected adversely. At least, some will be forced to render inferior service because of inadequate income. Thus we are faced again with a choice between opposite trends. The present policy of the Commission is to encourage competition regardless of adverse economic effects. This general concept of the law is at variance with the natural laws which force a limited market.

Unfortunately, efforts to apply a concept of unlimited competition in the teeth of a technical limitation in the availability of channels encourages concentration of facilities in larger communities at the expense of smaller communities. This trend is augmented by the economic tendency to concentrate facilities in large centers of population where there is greater purchasing power to support profitable stations. The desirable social objective to render radio service to all listeners, both rural and urban, at times conflicts with the pressure to make multiple transmission facilities available in all of the metropolitan centers of the nation. These factors unless controlled cause inequitable distribution of facilities to the various States and communities, contrary to the requirements of the Communications Act of 1934. Thus, a policy of unlimited competition is in conflict with the legal mandate to distribute facilities fairly, efficiently and equitably throughout the nation. This dilemma becomes even more difficult to resolve because allocation of facilities to any area is dependent upon voluntary applications. It is obvious that unlimited competition among stations in any community is impractical when the total number of facilities available for the entire nation is limited. Emphasis, therefore, should be placed upon an equitable distribution of facilities to the various communities of the nation, rather than upon an impractical objective of unlimited competition which can never be wholly achieved because of physical facts. Furthermore, if primary emphasis is placed upon the equitable distribution of facilities to the communities of the nation, there need be no concern for any destructive local competition until the radio technique has advanced to the point where many more channels are available. Moreover, if this course is followed it should facilitate the establishment of additional networks if the economics of the situation justify such a development.

(B) COMPETITION

(1) In order to obtain a common basis of understanding, it is necessary to agree that in the legal sense unlawful monopoly is confined to unreasonable practices which restrain trade or limit competition in violation of the anti-trust statutes. Competent legal authorities hold that unlawful monopoly is the acquisition of something for one's own self, not necessarily the whole of a given commodity or the whole commerce therein, but control at least, of a part thereof sufficient to constitute withholding from the public the right to deal therein in an open market. In broadcasting, however, we cannot start with a premise of an unlimited market. Natural laws limit the availability of radio facilities not only in each com-

munity but also in the nation. Therefore, we must frankly recognize in considering the regulatory problem that we are dealing with a phenomenon limited by natural causes. The paramount objective should be "public interest, convenience and necessity" as related in terms of the best radio service to the nation as a whole.

(2) Intensive competition exists in broadcasting within the natural restrictions of a limited number of facilities. Not only do major networks compete vigorously with each other for the advertising dollar, but also all stations, including those affiliated with networks, compete with the networks. Furthermore, each individual station in a community or region competes with every other station in that community or region. Moreover, radio as a whole is in stern competition for the advertising dollar with other media.

In 1938, 350 of the 660 commercial stations in the country were affiliated with one or another of the major networks. During the time utilized for network programs, competition on the part of these stations is limited to that competition occurring among the networks themselves. A station affiliated with a network has optioned certain time to the chain company and thereafter does not engage in competition with the chain company for such of the time as is used for commercial programs. However, the station still competes for "spot" advertising from sponsors who use the networks with which the station is affiliated. The competition of networks is subject to dynamic changes. Stations frequently change their connections with networks and will continue to shift affiliations as occasion demands. Since 1938 the number of network stations has increased.

(3) The necessity of efficient network organizations for the distribution of broadcast programs of national interest is axiomatic. Cohesive organizations which are always available for broadcasting intelligence to the entire nation provide the most effective force for national unity and may become absolutely essential in times of national emergency. There should be as many of these national network organizations in full competition with one another within the sphere of our economic system and as is practicable within the physical limitations imposed by nature. In like manner, it is highly desirable to encourage the organization of Regional and State networks. Without such competitive organizations for program distribution the very vitality of radio would disappear. Network competition for listeners has been the greatest progressive factor in the development of American broadcasting. Elimination of network programs is unthinkable. Government policies which might handicap efficient organization for network program distribution undoubtedly would create a public outcry against the depreciation in program service which would be a logical consequence.

These factors are of practical importance not only to the public, but also to the broadcaster, both when he desires to render service to the public as well as when he desires to sell the service of his station. They are of particular importance to the advertiser who desires to utilize the advantages of radio as a media to increase the volume of business. This practical situation confronting everyone interested in broadcasting should be recognized if the public is to secure good broadcasting service as well as to benefit indirectly from the standpoint of economics in the form of the cheaper costs inherent in vol-

ume production and distribution of goods. Therefore, in dealing with the broad question of possible monopoly or restraint of trade in broadcasting, the fact that unlimited availability of facilities and efficient program distribution cannot both be attained must be clearly recognized. We must likewise recognize that in broadcasting there cannot be the "open" market condition of other businesses. Nature has determined this.

(4) Certain practices of networks have been the subject of complaint aside from the contract arrangements between the chain companies and their affiliates. These include the operation of talent agencies, concert bureaus and transcription and record companies. It was a natural and logical development that in the early days of network broadcasting the networks should attempt to develop their own sources of talent. The record in this proceeding indicates that network companies utilize many sources of talent and make available to all the artists whose services are under exclusive contract to their management agencies. However, it does appear that there exists some conflict in the networks' position of being both buyer and seller of the services of the talent which they manage. It is believed that this Commission is without jurisdiction to remedy any abuses which may exist. Therefore, it appears proper to advise the network companies that the showing made in these proceedings indicates at least an opportunity to engage in unfair trade practices. Under such circumstances, the networks should be given an opportunity to divest themselves of these activities, or, in the alternative, the entire record should be referred to the Federal Trade Commission for a more thorough investigation upon which it could base findings and appropriate action.

However, it should be emphasized that network organizations should not be prevented from developing new talent. The record of this proceeding fails to disclose any great public concern about existing practices and it has not been established that the public has been injured because network companies maintain talent agencies. Rather, the complaints come from competing agencies who allege that the management of talent by networks who are also users of talent, results in unfair trade practices. The Federal Trade Commission is the appropriate agency to receive such complaints and make a determination. This Commission cannot pass upon these matters and, as related to broader questions involved in these proceedings, this problem is of relative insignificance. From this record it would appear that the desirable objective is to maintain an "open market" for talent with a minimum of restriction of opportunities for performers. With respect to the manufacture and sale of transcriptions and records by companies operating networks, a similar question may be involved. The complaints of competitors should be directed to the appropriate agency, namely, the Federal Trade Commission.

(5) The most important and frequent allegations of monopoly in broadcasting spring from the contractual arrangements between the chain companies and their affiliates. Under the standard form of contract an affiliate agrees to restrict the use of a station to a particular national network and to option a large portion of the time of such affiliate regardless of whether all of such time is used by

the chain company. It is claimed by some that the exclusive and the option clauses in certain of the chain contracts have limited the ability of the licensees to fulfill their responsibilities to the public. There are those who assert that the disputed clauses not only constitute a restraint upon free competition but also limit the ability of licensees to fulfill their responsibilities to the public as required by the law. Others contend that the legal effect of the contracts as well as actual practice indicates that licensees have not been prevented from fulfilling their duties under their licenses. We think that the record of these proceedings amply supports the latter view.

In entering into affiliation contracts licensees have placed certain voluntary restrictions upon themselves. However, the contracts provide that the station may cancel any program which in the judgment of the licensee is contrary to public interest or may substitute local programs of outstanding interest. In an extreme case, a licensee may be confronted with the choice between violation of the terms of his contract or the failure to carry some particular program or event which he knows his listeners want to hear. However, these cases are isolated and rare and do not appear to afford a proper basis to adopt a sweeping policy which might impair the cohesiveness of the national network organizations. In these circumstances the advantages should be weighed against the disadvantages before any attempt is made to disturb these contractual arrangements. It seems clear from this record that the benefits of the type of network organizations which have developed far outweigh any abuses which have been shown.

If this type of contract is essential to the maintenance of sound network operation—and the great weight of the evidence is to that effect—no attempt should be made to change them.

It is not necessary or desirable to prohibit options of a station's time. The record does not reveal that the operation of the option clauses have restricted the affiliates in their obligations to their local communities.

In fact, affiliation connections and time options appear essential because they facilitate better radio service to the public. Also, they appear necessary for effective coordination of program service on a national scale, because without them the situation would be analogous to a railroad in which each station-master along a *through route* had adequate power to make his own train schedules for through trains.

There is another aspect of network affiliation contracts which must be considered from the stations' point of view. The affiliated stations through their contractual arrangements with the networks have something which is in the nature of a valuable franchise. Networks, because of the exclusive arrangements with stations, have the incentive to develop good programs and to build up the affiliate stations as an institution in the community. Likewise, the station under its contract publicizes the programs of the network and identifies itself as the exclusive outlet for the particular network. The record shows that this arrangement has resulted in real competition among networks to win the listeners' interest. Such a competitive situation is definitely in the public interest. The result is that the affiliate station operating under an exclusive contract has greater value to adver-

tisers, both local and national. The experience of independent network stations definitely proves that a network contract is a valuable asset, both in terms of public service and in financial return to the station. The record in these proceedings indicates that the overwhelming majority of the affiliate stations recognizes that their existing network contracts constitute a most valuable franchise. The overwhelming majority of these stations does not want these arrangements disturbed. Through their testimony and by counsel, they have stated that they would prefer to maintain an individual bargaining position with the networks without intervention by this Commission into their business arrangements. This is as it should be, and measured in terms of public service—which should be the Commission's only concern—these contracts have met the test.

(6) In any consideration of the problems involved in chain broadcasting, one should not overlook the fact that the public should have a wide choice of programs. If all the stations in the country habitually broadcast identical programs, the service rendered would be limited. If the best interests of the public are to be served, no two stations rendering primary service to substantially the same area should habitually broadcast identical programs. Furthermore, more than one station in any community continuously rendering identical program service is a waste of radio facilities. It is not deemed necessary for the Commission to issue a regulation prohibiting duplication of a program in the same primary service area. Economic laws take care of such situations automatically and the practice is not sufficiently prevalent to justify any attempt to adopt a general regulation.

(7) Some criticisms of broadcasting are erroneously attributed to the fact that most of the licensees are business men. It is claimed that as such, their judgment as to social philosophies is similar. Thus, as a group they are said to reject social and economic philosophies advocated in recent years by some of our more "advanced thinkers". Therefore, it is claimed that the broadcasting licensees as a group are rendering to the people of the United States the character of broadcasting which tends to favor one social philosophy as contrasted to all others and that as a result the existing broadcasting service is not useful in accomplishing desired social improvements. The indisputed facts are that radio broadcasting has been utilized as an open forum. Furthermore, under the American system, the objective has been to render to the public the radio service the public desires rather than to force upon the public the type of service which individuals think the public should have.

Experience does not justify the conclusion that the limited number of available frequencies should be apportioned to groups of men or to separate organizations who are proponents of particular social philosophies. In fact, such a course might well destroy the general usefulness of radio. It would result in a trend toward the use of radio for a particularized purpose rather than its use in the public interest generally.

Under the American system of broadcasting the licensees are required to exercise independent judgment with respect to the operation of their stations. If this judgment is such as to render to the public the service the public desires, there can be no valid criticism. On the other hand, if a licensee does not render to the public the type of service

it requires, the qualifications of such a licensee to operate a broadcasting station should be open to question. We think that the Congress directed the Commission to require that no broadcasting station shall be operated for a single private interest. If there is doubt as to what Congress intended, it should be asked to clarify or specifically affirm this policy. Every broadcasting station should be operated solely in the interest of the entire public and no licensee should operate his station in a manner which reflects only one school of thought in controversial political, social, and economic matters of vital interest to the public. We think that, on the whole, broadcasters recognize this policy and adhere to it. It has found expression in the industry's voluntary code and is fulfilled in most important aspects.

(C) LICENSING POLICY

(1) It can be argued that all forms of unregulated monopoly are inherently contrary to public interest, and that to protect the public it is essential to regulate all monopolies. There can be no logical objection to such a doctrine when it is designed to restrain the exercise of unbridled power by private enterprise operating in the field of the public domain. In broadcasting Congress has provided for such regulation through the control of the issuance of licenses by the Federal Communications Commission. Therefore, any concentration of control in radio broadcasting which is contrary to public interest can be curbed by applying the licensing policy specified by Congress. The present Act implies that competition in broadcasting should be fostered through the application of a licensing policy designed to prevent a single individual from operating a preponderance of stations in a community or in the nation. If the licensing policy should permit one person to operate several stations within a community or to control the operation of too many stations in the nation, it is possible that a single person might be able to prevent the use of radio by persons other than those approved by the licensee. Such a course would be contrary to the spirit not only of the Act but also contrary to the best use of radio under the American system.

There are several instances of common ownership of several stations in a single community. However, no one has complained officially to the Commission of any abuses arising from such common control and there is no evidence in the files of the Commission or in the record of the hearing which indicates the necessity of promulgating a rule to correct such an imagined "evil". Nevertheless in some of these instances the operation of more than one station in the same community by a single licensee may raise a question of whether such concentration of control is in the public interest. In other cases such a situation may be in the public interest. The simplest and fairest way to solve the matter is for the Commission to adopt a policy, by regulation or otherwise, not to license more than one station in the same community to a single person, unless such person can show that such multiple operation is in the public interest. If such a course of action be adopted, a hearing should be held on the reasonableness of the proposed rule. At the same time the applications for renewal of all existing licenses which are not in conformity with the proposed

rule should be set for hearing. If as a result of these hearings, it is found that the continuance of the existing licenses of some of the licensees would not be in the public interest, the Commission should afford such licensees a reasonable time, say at least two years, in which to dispose of their stations.

(2) In connection with the problem of broadcasting control, it has been alleged that chain companies which operate networks utilize a large portion of the radio stations of the nation for the distribution of their programs. This question is raised with added fervor because such chain companies have the exclusive and optional clauses in contracts with their affiliates to assure control of the time of stations. Thus, it has been argued that such a chain company has the power to prevent the use of radio by persons other than those who can successfully negotiate with the chain company for time on a network. This question is one of the most difficult and controversial matters confronting the Commission.

As a remedy for this alleged evil, it has been proposed that program production agencies which engage in the business of providing programs to regularly established networks be prohibited from obtaining a license for the operation of any radio station.

It is essential that such an administration of the licensing power be analyzed thoroughly before adoption in order that we may be assured that the "cure" is not more vicious than the alleged evil. Every broadcast station licensee is a program production agency. A chain company is merely a program production agency equipped with land lines, and organized for efficient program distribution to the radio stations in the nation. Such efficiency of organization is essential and desirable if the public is to receive the best service. Therefore, there can be no valid objection to such organization, particularly when the service rendered is as acceptable to the public as it has been in the past. If the licensing of stations to such organizations will augment the efficiency of program distribution, there can be no valid objection to granting radio station licenses to such companies. Therefore, it would appear undesirable in the public interest to refuse on the basis of a general policy such companies licenses for any radio broadcasting stations. If a licensing policy is adopted which limits the number of stations licensed to chain companies in such manner as to insure competition and diversification of judgment, public interest would be served quite adequately. It is difficult to see why, in the interest of efficiency and cohesiveness in the distribution of programs on a national scale, there is any valid objection to licensing chain companies to operate at least one radio station in each of the larger metropolitan cities of the nation.

A more difficult question is raised by the operation of two network systems by a single company. The Commission might make the finding that two stations in a single community which obtain network service from the same source do not perform a proper public service. However, this would require evidence in a particular case in which the type of service rendered by each station was carefully analyzed and a record on these issues specifically developed. There is no evidence in this proceeding on the failure of stations affiliated with the company operating two networks to meet the test of public

interest. Nevertheless, the common ownership of dual networks raises questions of unreasonable restraint of competition. Therefore thorough-going inquiry is necessary to determine the legal effect of such dual operation in terms of monopolistic practices or restraint of trade. Such an inquiry is obviously under the exclusive jurisdiction of the Department of Justice which has the duty to prosecute matters pertaining to monopoly and restraint of trade. The Commission can request the Department of Justice to initiate an inquiry to determine the real facts. Or, if the Commission desires a determination of the proper public policy on this question, it could request Congress to make an appropriate declaration. However, before either of these steps is taken it is believed that there is available a more practical and immediate approach. This problem seems to be one which lends itself to an effort by all parties concerned to seek a solution by voluntary agreement.

In the solution of this problem one should not overlook the fact that operation of dual national networks provides an excellent "safety valve" in the present broadcast organization. There is readily available at all times an efficient nation-wide organization of radio facilities for discussion of important public questions. This "safety valve" should not be abandoned until a satisfactory substitute has been provided. Therefore, before taking any final steps it appears essential that all networks assume an even greater obligation to make their facilities available as a forum for discussion of public questions, as well as for sustaining programs of outstanding interest.

Undoubtedly there is a strong presumption that four highly competitive independently operated national networks would result in improved service to the public. However, as a corollary to this result it is essential that no single network be assigned an inequitable share of the duty to provide the service which makes radio broadcasting most useful in aiding the development of the political, social and economic welfare of the nation.

Therefore, precautions must be taken by the industry itself to avoid such inequalities or else the advantages to be gained by the elimination of dual operation of networks will be lost. It is doubtful, as has been stated, that the Commission through its licensing power or its rule-making power has the authority to accomplish the divestiture of one of the dual network systems. However, if it be determined finally that the disadvantages of dual operation of networks outweigh the advantages, and if a satisfactory substitute has been provided, the company which has developed the two networks it now operates should be given every opportunity to voluntarily adjust its operations to the end that the problem of common ownership of dual networks is eliminated. Failing this, the Commission should refer the entire matter to Congress.

(3) It has been suggested that any program production agency, particularly chain companies, should be compelled to obtain a Federal license to engage in such a business. There are numerous agencies which organize talent and in a sense produce programs to be utilized by the various radio stations. It is a simple matter to lease wires from a program production center to various broadcast stations distributed throughout a region or the nation. Such wires

can be leased for either a short or a long period. Some of these program production agencies may be organized on a large scale while others may be organized on a small scale. In any event, if the Government should adopt the policy of licensing program production agencies, the Government would be confronted at all times with a significant question. This question is inevitably whether the proposed program content will or will not be in the public interest. This is censorship. Furthermore, it would give to the licensing agency of the Government a power never contemplated in the statute or in its administration to date. It would constitute a power of Government to control what was said and who should speak. It would be control of the news obtained by the press and intended for distribution to the public by radio. Such a power concentrated in a licensing agency of the Government is dangerous in a democracy and would inevitably lead to a further curtailment of freedom of expression. This violates the Constitution of the United States. There is no reason why basic principles of democracy should be abandoned merely because radio is a modern instrumentality with inherent limitations in its application to the public service. Thus it is obvious that the advantages alleged to accrue from the licensing of program production agencies are outweighed overwhelmingly by the one disadvantage just discussed.

In view of the foregoing, the Government should neither prevent program production agencies from obtaining licenses to operate radio broadcast stations, nor should the Government compel program production agencies to secure a Federal radio license to engage in such a business. There is nothing before the Commission to justify such a course.

(D) ECONOMIC STABILITY

(1) Wide variations of prosperity exist between the various elements of the broadcasting industry. While some of this is caused by natural economic laws, and by differences in markets, the necessary inequality between the various classes of stations as well as differences imposed by nature within each class are also important factors affecting earning capacity.

(2) The business of broadcasting is essentially a service business. It has no tangible commodity of a permanent character. It has merely a temporary license to use frequencies which are essential to the operation of its equipment. Not only must each broadcaster maintain the public confidence and interest in the service rendered, but also the licensee must operate on a rigid basis of regulation by the Federal Government. In addition, the industry is confronted with swift change, rapid obsolescence and speedy and new demands upon the enterprise, initiative and capital of its members. There is always present the threat of sweeping changes in the technical base on which the radio stands, as for example, such developments as television and frequency modulation. In time of economic recession in the nation the business of broadcasting is affected immediately by cancellations of contracts for services. Thus, there is a potential risk ever present in the business of broadcasting, and a necessity for adequate financing at all times.

(3) These conditions constitute an economic situation which influence directly the broadcaster's capability to render a public service. Naturally, the Commission should be just as much concerned with the economic situation as it is with encouraging progress toward desired social objectives. However, it should recognize that its authority is not absolute and that it is not charged with the responsibility of directing the economic activities of its licensees. There is the positive duty to make certain that Commission policies do not detract from the economic stability of the industry, but there is no justification for the adoption of radical measures which would revolutionize the entire economic foundation without any certain knowledge that real improvements can be obtained.

An important contribution which the Commission can make to the stability of broadcasting is by an extension of the licensing period. The Commission now has the power to extend the period up to three years and there is no valid reason why this should not be done forthwith. Such a policy would result in an important administrative economy by reducing the great volume of needless and periodic reviews by the Commission staff of a mass of information which is accumulated and filed for no real public purpose. Such an extension of the licensing period would in no way limit the Commission's power to proceed by revocation against licensees who contravene public interest in the operation of their stations, and would create a helpful atmosphere of security.

Finally, it has been implied that there is something harmful or wicked about the earnings of some broadcasting licensees. Congress did not intend this Commission to penalize profits. Congress does now and will continue to tax the earnings of all broadcasters, as an examination of the financial statements of any of the leading companies in the field will show. If there be undue or unjust enrichment, the Federal tax policy is the remedy; not an extension of regulation.

III. SUMMARY OF SUPPORTING FACTS

(A) GENERAL

The Report of the Committee appointed to recommend Proposed Rules Governing Standard Broadcast Stations and Standards of Good Engineering Practice, (Docket 5072-A) outlines the physical aspects of the existing radio broadcast structure. In brief, this report disclosed that there was a concentration of the best radio facilities in the larger metropolitan districts of the nation and that the listeners in the less sparse areas of population obtained radio service principally from the larger stations located in the large centers of population. One of the recommendations of this Committee was as follows:

In granting applications for improvements of facilities, the Committee recommends that the Commission adhere in general to the following order of priority:

- (1) Communities having no radio stations and capable of supporting same.
- (2) Communities having existing stations with inadequate technical facilities to serve properly the population therein.
- (3) Communities having an adequate number of radio stations and capable of supporting additions without detriment to resultant service.
- (4) Existing stations at a competitive disadvantage with other stations in the community by reason of inadequate technical facilities.

In connection with the problem of distribution and improvement of broadcasting facilities the evidence is clear that for the purpose of allocation, each of the 96 metropolitan districts of the nation should be considered a single community. The economic interdependence of the various incorporated cities, towns, and villages in such a metropolitan district, the overlapping service areas of broadcasting stations located in such districts, and the general scarcity of broadcasting facilities available for distribution to the nation as a whole are compelling factors contributing to the impracticability of attempting to assign separate broadcasting facilities to each of the individual communities within each metropolitan district.

The Committee, therefore, recommends that when considering the distribution of broadcasting facilities to all communities in the nation, the Commission classify as a single entity each of the 96 metropolitan districts described by the Bureau of Census.

The Report on Social and Economic Data Pursuant to the Informal Hearing on Broadcasting, Docket 4063, beginning October 5, 1936, submitted by the Engineering Department of the Commission on July 1, 1937, outlined in considerable detail the social and economic factors affecting the operation of the broadcasting structure at that time. The evidence developed since that date, and particularly in Docket 5060, relating to the Investigation of Chain Broadcasting pursuant to Order No. 37, contains no information of an economic character which indicates that the evidence obtained previously is erroneous in any respect.

The basic pertinent facts as disclosed in the hearing on Chain Broadcasting, Docket 5060, may be summarized in brief as follows:

(B) ORGANIZATION OF BROADCASTING FACILITIES

In the United States in 1938 there were 660 radio broadcast stations which operated on a commercial basis. These stations rendered program service to the various communities, States, and rural areas of

the nation. 350 of the stations were organized in 4 major networks for program distribution on a national scale. These national networks transmitted to the radio listeners of the country programs originating not only in various parts of the United States but also in the most important centers of the world.

Three of these networks of stations were vitalized by a central organization known as a chain company which undertook to produce programs and secure advertising revenue for the networks as a whole. Each of these chain companies had a centralized program production organization which coordinated the distribution of programs originating in the various parts of the nation. In addition, each of the chain companies had a sales organization which made contact with advertisers and advertising agencies and arranged for sponsors of the various programs. Some of the programs were produced by sponsors. Other programs, particularly those of the sustaining type, were organized and produced by the chain company, or in the event of news or political broadcasts, were "covered" by the chain company also. Some programs were produced by individual stations of the network and distributed to the entire network. The other major network was organized similarly to the three just mentioned, except that the production of programs was undertaken principally by the stations in the network.

There were 3 national chain companies, namely, the Columbia Broadcasting System, the National Broadcasting Company, which had 2 national networks, and the Mutual Broadcasting System. Columbia and National had contracts with their affiliates which bound the latter as outlets, and bound them to retain on option a definite amount of time. Until more recently Mutual operated on a voluntary "mutual" basis and permitted its outlets to take programs from other chain companies, as well as providing liberally for "time" to be retained by the affiliates. The other principal difference between Columbia and National on the one hand and Mutual on the other is that Columbia and National are separate corporate entities owning stations and contract with affiliates for exchange of services at an agreed price. Mutual is owned by several station licensees and makes affiliation contracts with other stations. Mutual in its headquarters sales-agency capacity usually takes a commission of 3.5% from members and 15% from affiliates for business it secures for the System. Any station, a part of Mutual, may secure business for the System on a commission basis.

There were 310 stations which were not affiliated with any national network. Some of these 310 stations were affiliated with regional networks, but in some instances these stations were in such locations as to preclude affiliation with a major national network without duplication of programs in the same area to the public. Also, some of these 310 stations were located in remote sections of the country or in sparsely settled communities where the cost of network program service was greater than the revenues secured from advertisers desiring to use the station as an outlet. Therefore, in 1938 these 310 stations relied solely upon local resources or upon transcriptions or upon regional networks for the production of programs. However, since that date some of them have become affiliated with a national network.

In addition to the 4 major national networks there were several regional networks in 1938, which were organized to transmit programs

originating in any part of a particular region or particular section of the country, depending upon the number of stations comprising such a network.

The 660 stations were classified in accordance with the rules of the Federal Communications Commission. This classification is necessary in order that, in so far as is practicable within the requirements of good engineering practice, there may be a fair, efficient, and equitable distribution of facilities to the various states and communities of the nation, and at the same time permitting the rendition of good service to all the listeners wherever located in the nation.

In 1938 the distribution of the 660 stations by classes and by size of community is indicated in Table 1 A attached hereto. This table shows that there were 31 full time 50 kw clear channel stations, 4 limited time 50 kw clear channel stations, 14 full time clear channel stations having a power less than 50 kw, and 4 stations of the same class having only limited time. There were 8 high power regional stations, all of which had full time. These 61 clear channel and high power regional stations render service over wide areas and are the type of stations relied upon for service to rural listeners.

There were 296 regional stations utilized primarily for rendering program service to cities and areas immediately adjacent thereto. Of these 296, 195 were full time stations, 68 were limited time or day stations, and 33 were part time stations which shared their frequency assignment with one or more stations. There were 303 local stations intended to be utilized primarily for rendering service to small and medium sized cities or towns. Of these 303, 227 were full time and 76 were part time stations.

The distribution of the class of stations to the various size of cities was as follows:

City population	Total number of stations	Clear channel	High power regional	Regional	Local
2,000,000 or over	83	17	0	47	19
1,000,000 to 2,000,000	27	5	0	17	5
500,000 to 1,000,000	40	2	4	22	11
250,000 to 500,000	85	13	0	52	20
100,000 to 250,000	94	9	4	48	33
50,000 to 100,000	50	3	0	26	21
25,000 to 50,000	89	2	0	30	57
Less than 25,000	192	1	0	54	137
Total	660	53	8	296	303

It is significant to note that 329, approximately one half of the total stations in the country were located in the 96 metropolitan districts of the nation. Of the remaining 331 stations, 215 were of the local classification, 110 were of the regional class and 6 were clear channel stations.

(C) THE ECONOMICS OF BROADCASTING.

Broadcasting stations are supported primarily by advertisers desiring to utilize these media as a means of promoting the sale of commodities or services to the public.

Each broadcaster, whether the licensee of a large station or of a small one, each network and each program production agency, re-

ceives compensation in proportion to the value of the services rendered by each such organization. This value is affected directly by the degree to which the broadcast licensee, the network, or the program production agency satisfies the public. In other words, the greater the public interest in the radio service being rendered, the greater the value of radio to all concerned. Thus, the closer radio broadcasting service attains the objective of satisfying the public, the greater the rewards to the members, both large and small, of the industry. This is as it should be. Any attempt to circumvent this basic economic law, by Government fiat or otherwise, is certain to result in economic instability with its inevitable adverse effects upon sound American business enterprise as well as upon good program service to the public.

Advertisers are interested in "circulation" within a market. The "circulation" obtained by any radio station is dependent upon the number of listeners in the area covered by the station. The number of listeners depends upon the character of the program service rendered by the station, the licensed power of the station, its hours of operation and the number of competitive stations in the same market area.

Good markets are of primary interest to an advertiser because in an area where the purchasing power is large, the advertiser may reasonably expect a fair return on the monies expended for advertising, provided of course the public becomes interested in the product being distributed. On the other hand, if the purchasing power of the public in any given market is insufficient to justify the cost of advertising, the manufacturer or the wholesaler or the retailer may not desire to expend advertising funds in such a poor market.

Thus the revenue and income of the broadcast industry as well as units thereof are affected by--

- (1) character of program service,
- (2) type of facility,
- (3) type of market in which a station is located,
- (4) competition from other stations in the same market;
and by
- (5) management.

To date, stations which are located away from the centers of talent have been successful in stimulating public interest in the program content broadcast from their stations by being affiliated with a network. This affiliation enables a station to broadcast programs produced in the best talent centers and by the best talent in every section of the country and permits the dissemination of news of important events, not only in this country but also abroad. A station which is not affiliated with a network and not located favorably with respect to talent and market is handicapped in producing a program service which can sustain public interest.

Generally speaking, those stations which operated at a profit in 1938 were in a favorable position with relation to the factors just enumerated. On the other hand, those stations which operated at a loss had one of the following factors unfavorable to them:

- (1) Circulation.
- (2) Intense competition.
- (3) Management.

In many instances the lack of favorable circumstances in the foregoing three factors was augmented by lack of network affiliation, inadequate facilities as to power and hours of operation, or by extraordinary expenses or utilization of "profits" in the form of salaries.

This outline of the economics of broadcasting is based upon an accumulation of data which has been condensed in the Tables attached hereto. Inasmuch as these Tables represent a compilation of data secured from a series of far more complex Tables, it is difficult to brief further the data without sacrificing adequate representation of all the factors which must be considered. It is, therefore, recommended that the Tables which are attached hereto be studied in order that full appreciation may be had of the significance of all the economic factors involved and in order that independent conclusions may be reached.

The locations of the different classes of stations operating at a profit or loss in the different types of markets are indicated in Table I B attached hereto. It should be noted that the poorer the class of station the greater chance of losing in any market. Also, the poorer the market the greater the chance of operating at a loss. The greatest percentage of losers were the local stations. While there were a greater number of local stations than any other single class, the chances of operating at a loss were greater in local stations than in any other class. Likewise, the chances of operating at a loss were greater when a station was licensed only for part time. Generally speaking, network stations had greater revenues than stations not affiliated with any major network, and consequently the chances of losing were less for network stations. These factors are illustrated by the following Table, which shows the percentage of losers by classes of stations.

Percent of stations of each class operating at loss in 1938	Classes of stations
7.5	Clear channel and high power regional, unlimited time.
12	Clear channel, part time.
26	Regional, unlimited time.
42.6	Regional, day and unlimited time.
45.4	Regional, part time.
45.3	Local, unlimited time.
48.7	Local, part time.
36.5	All stations.
26.5	Network stations.
47.5	Nonnetwork stations.

In general, the broadcast revenues of the various stations decreased as the value of the market in which the station was located decreased. Revenue of stations having good facilities was greater than those with less favorable facilities.

These facts are illustrated by the curves given in Tables II, III, IV and IV-B.

The average revenue and income under the various conditions for 660 stations in 1938 is illustrated in Tables V, V-B, VI and VII. These show that 420 stations operated at a profit and 240 stations operated at a loss in 1938. Of these 660 stations, 350 were affiliated

with one of the major networks and 310 were not affiliated with any major network. Of the 350 network stations, 92 operated at a loss. Of the 310 non-network stations, 148 operated at a loss. Most of the stations affiliated with networks operating at a loss were located either in a poor market or in a good market in which there was intense competition. Some of the other stations operating at a loss had poor facilities, such as only part time or low power. Eighty-two of the stations operating at a loss were located in cities of less than 25,000 population, 54 in cities from 25,000 to 100,000, 57 in cities from 100,000 to 500,000 and 47 in cities of over 500,000 population.

The distribution of broadcast revenue and income to the various classes of stations and to the chain companies is indicated in Tables VIII, IX, X, and XI. The distribution of the dollar revenue and income is indicated in Tables XII and XIII.

From these tables it is obvious that the vast volume of revenue went to the chain companies and the 350 stations on the networks. Three hundred and ten stations not affiliated with any network had 12.7 per cent of the total volume of revenue. The three major chain companies and the stations licensed to them had 40.1 per cent of the total revenue, distributed as follows: 16.5 per cent to Columbia, 23.1 per cent to National and 0.1 per cent to Mutual. The stations affiliated with but not licensed to the chain companies obtained 46.7 per cent of the revenue. Four regional networks obtained 0.5 per cent of the revenue.

The ratio of net income to net time sales in 1938 for selected typical stations in various classes of markets and for the chain companies, is given herewith.

Organization or class of station	Ratio of net income to net time sales (per cent)	Approximate 1930 population of Metropolitan District in which station is located
Columbia Broadcasting System	21.2	(1)
National Broadcasting Company	15.2	(1)
Mutual Broadcasting System		(1)
50-kilowatt clear channel station	23.9	161,000
Do	32.3	2,100,000
1-kilowatt regional with network affiliation	13.8	379,000
Do	11.5	181,000
Do	.2	495,000
Do	5.8	2,850,000
1-kilowatt regional with no network affiliation	1.2	2,300,000
Do	6.5	2,300,000
Do	15.9	2,850,000
Local station with network affiliation	3.4	10,000,000
Do	37.3	119,000
Do	3.4	155,000
Do	15.3	19,000
Do	7.8	118,000
Do	10.8	425,000
Do	10.4	52,000
Do	5.0	820,000
Do	18	332,000
Do	32.4	399,000
Do	21.7	1,900,000

¹ Nation-wide network

² Operating losses made up by members.

Organization or class of station	Ratio of net income to net time sales (per cent)	Approximate 1931 population of Metropolitan District in which station is located
Local station with no network affiliation	0.04	608,000
Do	2.7	16,000
Do	19.1	800
Do	19.7	1,290,000
Do	.9	371,000
Do	3.2	949,000
Do	10.4	2,850,000
Do	8.3	21,400
Do	10.4	4,365,000
Do	7.9	14,300

The amount of net income and the percentages for the chain companies and the groups of stations are as follows:

Organization or class of station	Net income	Ratio of net income to net time sales (per cent)
Columbia Broadcasting System	\$3,541,739	21.2
National Broadcasting Company	3,434,901	15.2
2 clear channel stations	505,182	28.8
4 regional stations affiliated with networks	35,780	7.4
4 regional stations not affiliated with networks	68,632	6.9
10 local stations affiliated with networks	106,625	14.0
10 local stations not affiliated with networks	46,449	7.5

¹ The relationship to total revenue, which includes net time sales and incidental revenues, is 19.2 per cent and 13.3 per cent, respectively.

IV. CONCLUSIONS

There are certain factors which should provide the basis for consideration of the many complex problems in the field of radio broadcasting. However, as has been stated elsewhere in this report, no abrupt changes should be attempted without positive indication that such changes will result in improved service to the public. The record in this instant investigation does not justify sweeping proposals to change the developments resulting from practical experience.

It must be considered that since 1927, the American system of broadcasting has developed under a Congressional formula which, until recently, has been administered in its broad policy aspects with fair consistency by the Commission and, on the whole, uniformly interpreted by the Courts.

It must be admitted that imperfections exist. No human institution is free from error. It is significant, however, that this record fails to disclose important abuses. Moreover, no information is available to the Commission which justifies an invasion of the business practices of the licensees of this Commission.

It is true that some of the pioneers in broadcasting have achieved conspicuous financial success. Likewise others who have made contributions to the industry and the public have been well rewarded. This fact alone affords no proper basis for a radical extension of the regulatory scheme.

The record shows that in broadcasting there exists vigorous competition in the areas that count. It is the duty of the Commission to preserve and encourage such competition. However, we should not embark upon novel or untried courses of regulation based upon mere speculation as to how American businessmen should manage their affairs. Rather we should consider that the consequences of our acts might injure or retard further improvement in the existing system and the service which it now performs.

Competition accompanied by good radio service to the public should continue to be fostered by the Commission. However, the blind adherence to the slogan "free competition," regardless of all practical factors, is unsound and will result in a conglomeration of uncoordinated radio stations rendering an inferior service to the public.

On the whole, radio broadcasting has an excellent record of public service. This includes both networks and the independent stations. Possibly with a few isolated exceptions, radio has been scrupulously fair in dealing with questions of political, social and economic importance. It has been progressive and enterprising in the entertainment field. The public has been and should continue to be its most important and only censor.

Radio is so constituted that it is sensitive to public criticism and responds promptly to changing public tastes. For this Commission or any agency of Government to attempt to substitute its judgment for that of the public involves an arrogant presumption which should be avoided at all costs. That such a policy is not contemplated by anyone on the Commission seems quite clear. However, it can be

argued with logic that invasion of this economic field by the licensing authority in the absence of clear legal mandate, would constitute an inevitable prelude to the second step of assuming the role of arbiter of public tastes.

Circumstances may require the Federal government to exercise broad powers in many fields of our economic life; but it is imperative that broadcasting be maintained as a free American institution. To adopt some pattern of government regulation as applied in other fields is to ignore the real nature of broadcasting. Borrowed techniques just don't fit. Broadcasting must be kept free from unnecessary Government restraints. Nowhere has this concept been given better expression than in a recent statement of the President of the United States wherein he said:

Your Government has no wish to interfere or hinder the continued development of the American system of broadcasting. Radio was born and developed in the real American way and its future must continue on that basis.

Our views in this matter may be summarized as follows:

1. The Commission is without jurisdiction to promulgate regulations which undertake to control indirectly the business arrangements of broadcasting licensees.

2. The record shows vigorous competition among networks and independent stations within the limitations of facilities imposed by nature and thus no finding of illegal monopoly can be made by this Commission, even if it can be assumed that this Commission had the legal authority to make such determination.

3. The Commission through its licensing powers has ample authority to deal with any abuses that may arise, or which may now exist. Thus with the possible exception of clarification of the procedural and appellate provisions of the Communications Act of 1934, no legislative changes seem necessary.

4. There is no support in the record of these proceedings or otherwise in the possession of the Commission which would require new regulations which would attempt to control the relations between networks and affiliates.

5. Broadcasting service is essentially a national service. It must be recognized that listeners prefer good programs originating from any source where there is superior talent and which may have greater entertainment value than would otherwise be available from a purely local source.

6. There is an important function to be served by the smaller local stations. The Commission should continuously strive to improve the technical efficiency of such stations and, within the limits of the Act, afford encouragement to broader economic opportunities for such stations. This should not be attempted by the destruction or impairment of existing services. There is room for both.

7. There is the strong presumption that four competing national networks independently operated might afford opportunity for improved service, although there is nothing in this record to establish that stations affiliated with the company operating two networks have not rendered a good public service. It is, therefore, recommended that informal discussions begin forthwith between the Commission and the representatives of the company operating two networks with a view of obtaining a voluntary segregation.

8. Network companies maintain concert and artist management bureaus as an incident to their operations. The Commission has no jurisdiction in this field. However, the companies should be notified that the Commission intends to request an inquiry by either the Federal Trade Commission or the Department of Justice, or both, in the event the companies do not divest themselves of these activities within a reasonable time.

9. There is no reason why the Commission should not forthwith extend the terms of broadcast licenses to the full statutory limit of three years. This would create an atmosphere of greater stability in the industry and would in no way detract from the Commission's power to proceed by revocation against licensees who contravene the standard of public interest.

Finally, it seems appropriate to emphasize that our government is concerned with many important and crucial problems. This is no time to embark upon a new and untried course for which no urgent need can be established. It seems to us that the kind of democratic freedom which we are preparing to defend requires those in government to manifest restraint and tolerance. There is no evidence to justify an attempt at unnecessary controls of the broadcasting industry under even normal circumstances. In this atmosphere of world tension, our own national unity would be disserved by a new experiment at "reform" of an established system of mass communication upon which so many of our people rely for information and diversion.

TABLE 1-A													CLASS OF STATION	TABLE 1-B																
660 STANDARD BROADCAST STATIONS GROUPED ACCORDING TO POPULATION OF COMMUNITY IN WHICH LOCATED, NETWORK OR NONNETWORK SERVICE, CLASS AND TIME DESIGNATION, AND WHETHER OPERATED AT PROFIT OR LOSS. (1938)														AREA I				AREA II				AREA III				AREA IV				
LESS THAN 25,000 <i>Population</i>	25,000 TO 50,000 <i>Population</i>		50,000 TO 100,000 <i>Population</i>		100,000 TO 250,000 <i>Population</i>		250,000 TO 500,000 <i>Population</i>		500,000 TO 1,000,000 <i>Population</i>		1,000,000 TO 2,000,000 <i>Population</i>			MORE THAN 2,000,000 <i>Population</i>		TOTALS			NETWORK	NONNET	ALL	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL
NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL	NETWORK	NONNET	ALL		
				1		3		8 ¹		2 ²		4 ³		12 ¹²		30 ¹⁸	CC 50KW, FT	23 ¹⁷		23 ¹⁷		7 ¹		7 ¹						
						1		1						2 ²		4 ¹	CC 50KW, PT	3 ²		3 ²		1		1						
		2		2		2		3 ¹		1				1 ¹		11 ⁶	CC 5 to 25KW FT	6 ¹		6 ¹		4		4		1		1		
1						2										3	CC 5 to 25KW PT				2		2				1		1	
						4										8 ³	HP REG.	4 ³		4 ³		4		4						
11	7	15		14		28		31 ⁶	1 ¹	16 ¹⁰		6 ⁴	3 ³	6 ⁶	6 ⁶	127 ²⁴	FT REG.	50 ²⁴	10 ¹⁰	60 ²⁴	59 ¹	2	61 ¹	16	2	18	2	3	5	
4	4	5	3	4		9	1	5 ¹		2 ¹	1 ¹	1 ¹	3 ³	4 ⁴	5 ⁵	34 ⁷		11 ⁴	9 ¹⁰	20 ¹⁵	15	1	16	5 ¹	5	10 ¹	3	2	5	
2	11	1	4	1	5		1	1	2 ²	2 ²				2 ²		7 ⁷	LT REG.	2 ²	13 ¹⁰	15 ¹⁰	4	10	14		5	5	1	4	5	
			2	1		2	2	1	4			1				6 ⁴		1	7 ¹⁰	8 ¹	4	6 ¹	10 ¹		7	7		4	4	
	1			1		4		1		1		1 ¹				9 ⁹	PT REG.	1 ¹	9 ¹⁰	10 ⁹	6	1 ¹	7 ¹				1		1	
3	1					1	4	2								4 ⁴		2	4 ³	6 ³	3	3 ¹	6 ¹				2	1	3	
17	37	10	14	8	2	12	3	5 ¹	2	3 ²	4 ¹	1 ¹	2 ²			4 ⁴	LOCAL FT	3 ²	12 ⁸	15 ¹⁰	28 ¹	13	41 ²	18	20	38	7	23	30	
9	37	8	13	6	4	7	5	3	2	1	2 ¹		2 ²	1 ¹	3 ³	35 ¹		2 ¹	8 ¹⁰	10 ⁹	19	18	37	9	28	37	5	14	19	
2	21	1	4			1	2			4 ²						4 ⁴	LOCAL PT		8 ⁴	8 ⁴	2	8 ¹	10 ¹		9	9	2	10	12	
4	10	1	6		1	1	2			4 ¹		1 ¹				7 ⁷			12 ⁸	12 ⁸	1	8 ¹	9 ¹	4	4	8	1	7	8	
33	77	29	22	27	7	57	6	50 ⁹	9 ¹	29 ¹³	4 ¹	12 ⁹	7 ⁷	21 ¹¹	30 ²⁰	258 ²⁷	TOTAL	92 ²³	52 ⁴¹	144 ³⁴	117 ³	34 ¹	151 ¹	35 ¹	36	71 ¹	14	40	54	
20	62	14	24	11	5	20	11	14 ²	12 ²	3 ¹	4 ¹	3 ¹	5 ⁵	7 ⁷	25 ¹⁵	92 ¹²		20 ¹¹	40 ²⁴	60 ²³	43	36 ⁴	79 ⁴	18	44	62	11	28	39	
53	139	43	46	38	12	77	17	64 ¹¹	21 ⁷	32 ¹³	8 ⁶	15 ¹¹	12 ¹²	28 ¹⁸	55 ³⁵	350 ⁷⁰	GRAND TOTAL	112 ⁶⁴	92 ⁷³	204 ¹³⁷	160 ⁷	70 ¹²	230 ⁵³	53 ¹	80	133 ¹	25	68	93	
192	89	50		94		85 ¹⁸		40 ²⁶		27 ¹³		83 ⁴³		350	310	660														

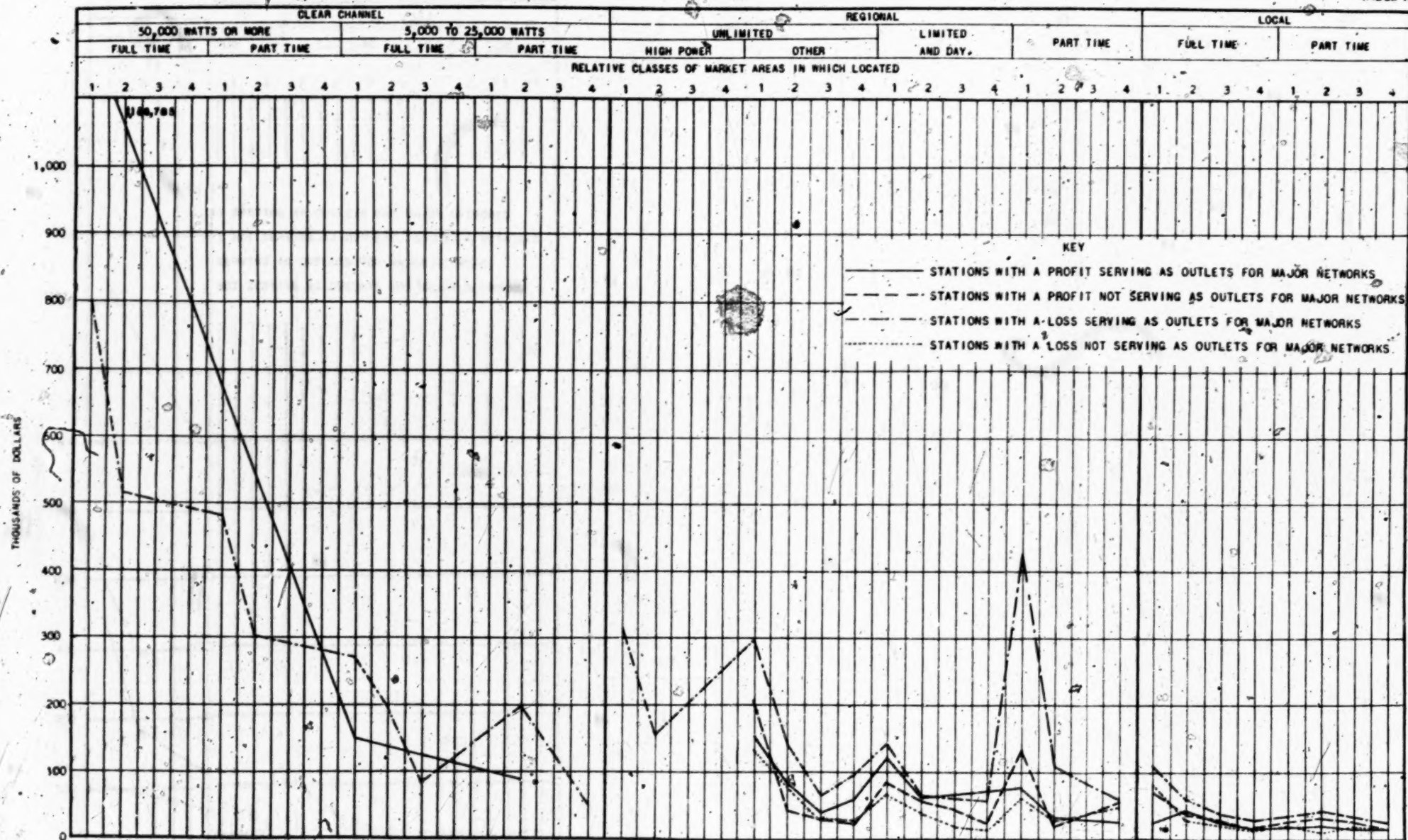
NOTE: Small upper figures in squares show number of stations having competition from 4 or more other stations in same community; small lower figures in squares show number having such competition with 4 major network outlets and hence could not obtain major network service without duplicating major network primary service area in whole or in part.

KEY TO CLASS OF STATION

CC Clear channel	REG Regional
FT Full time	HP High power
LT Limited time	PT Part time

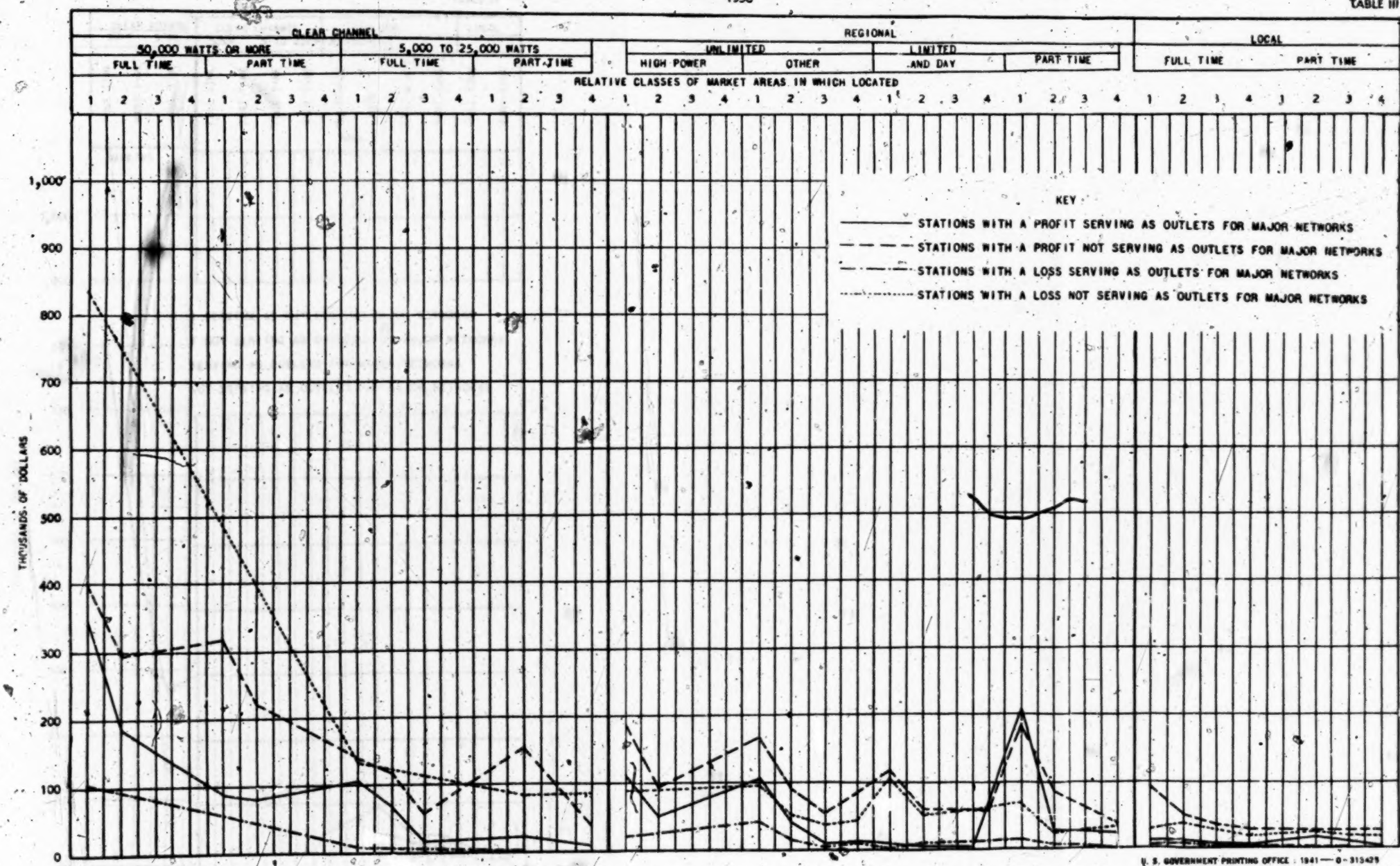
AVERAGE REVENUES COMPARED
660 STATIONS IN THE RELATIVE CLASSES OF MARKETS ACCORDING TO CLASSES OF STATIONS
1938

TABLE II



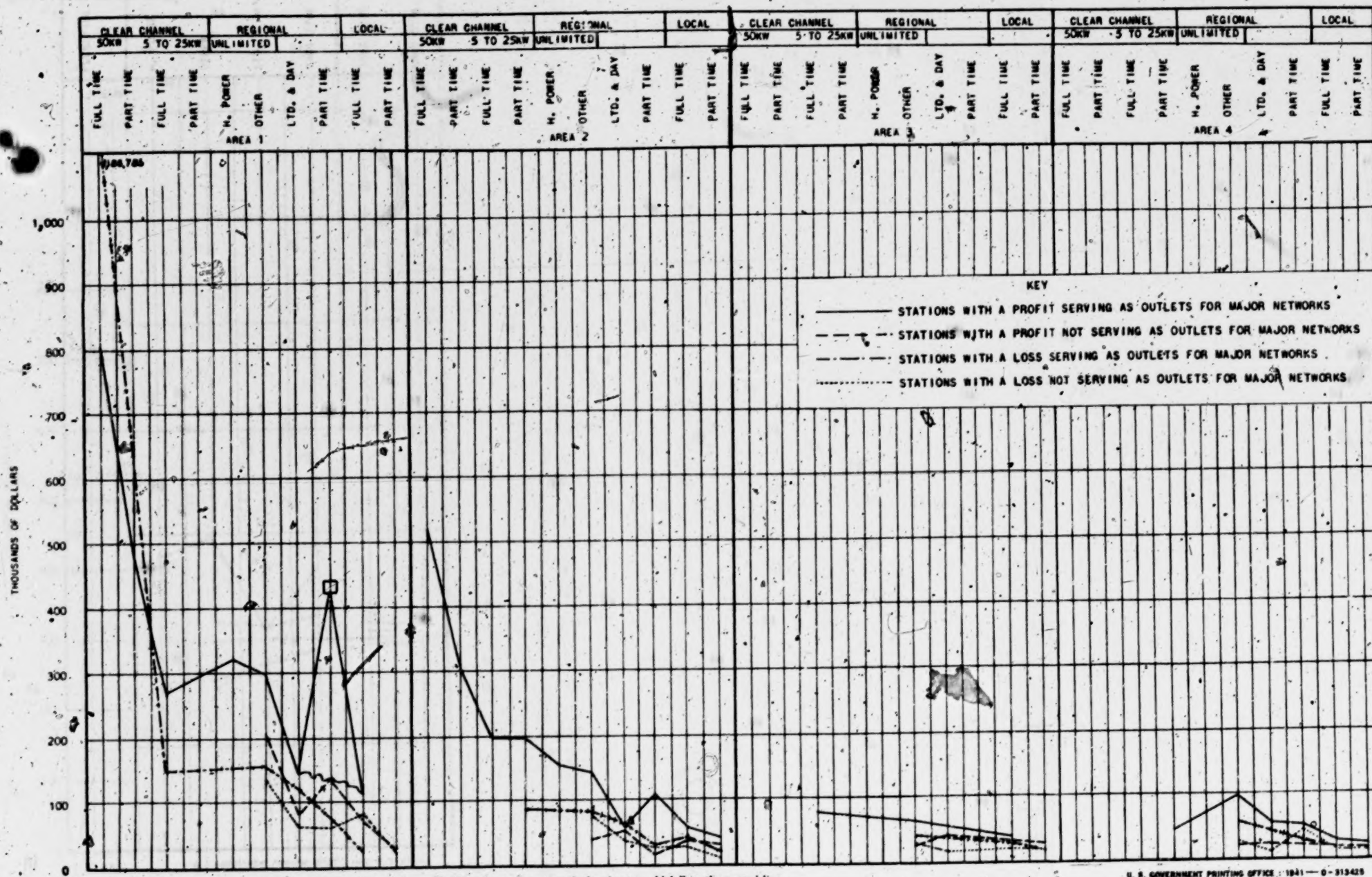
AVERAGE NETWORK AND NONNETWORK TIME SALES COMPARED.
350 STATIONS SERVING MAJOR NETWORKS IN THE RELATIVE CLASSES OF MARKETS ACCORDING TO CLASSES OF STATIONS
1938

TABLE III



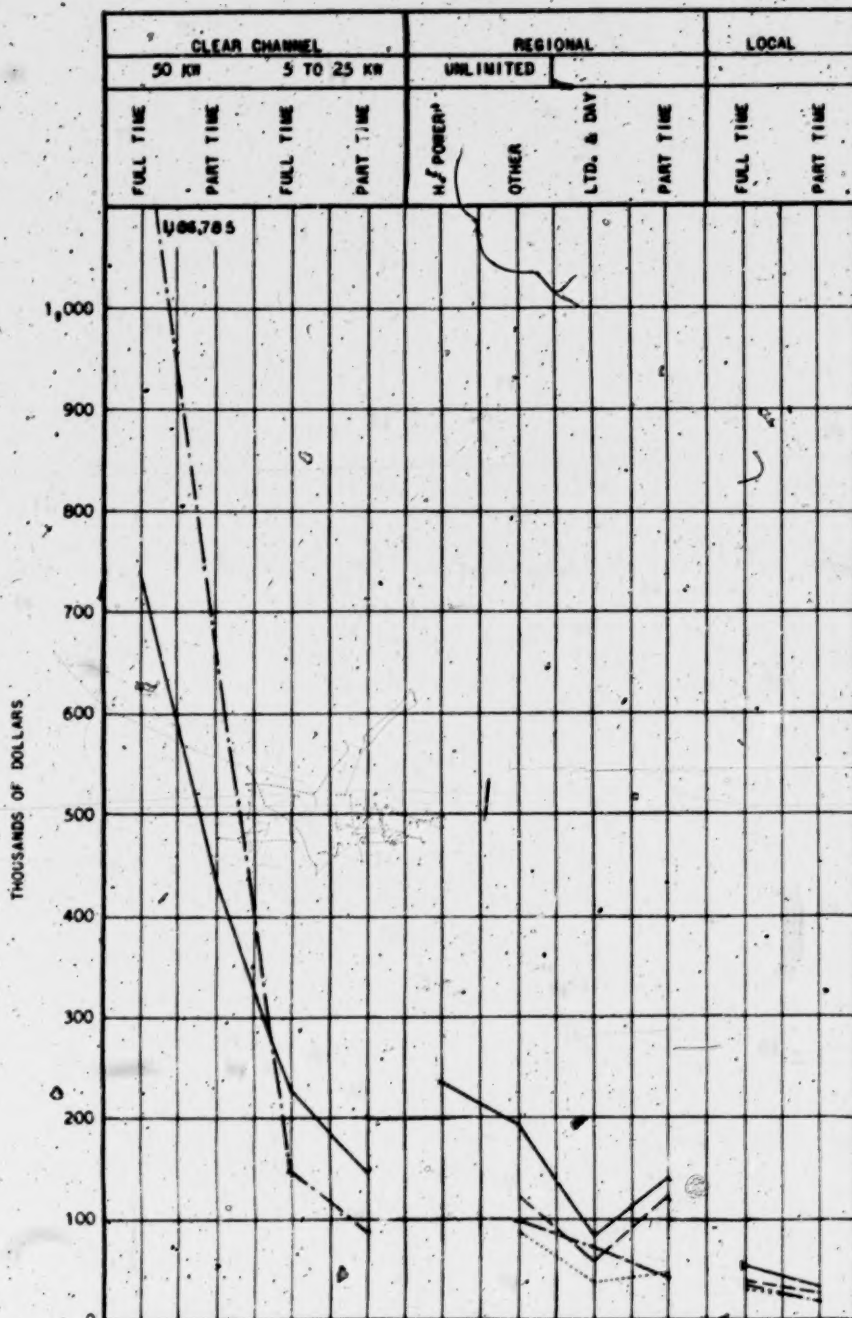
AVERAGE REVENUES COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS IN THE RELATIVE CLASSES OF MARKETS
1938

TABLE IV



**AVERAGE REVENUES COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS
1938**

TABLE IV A

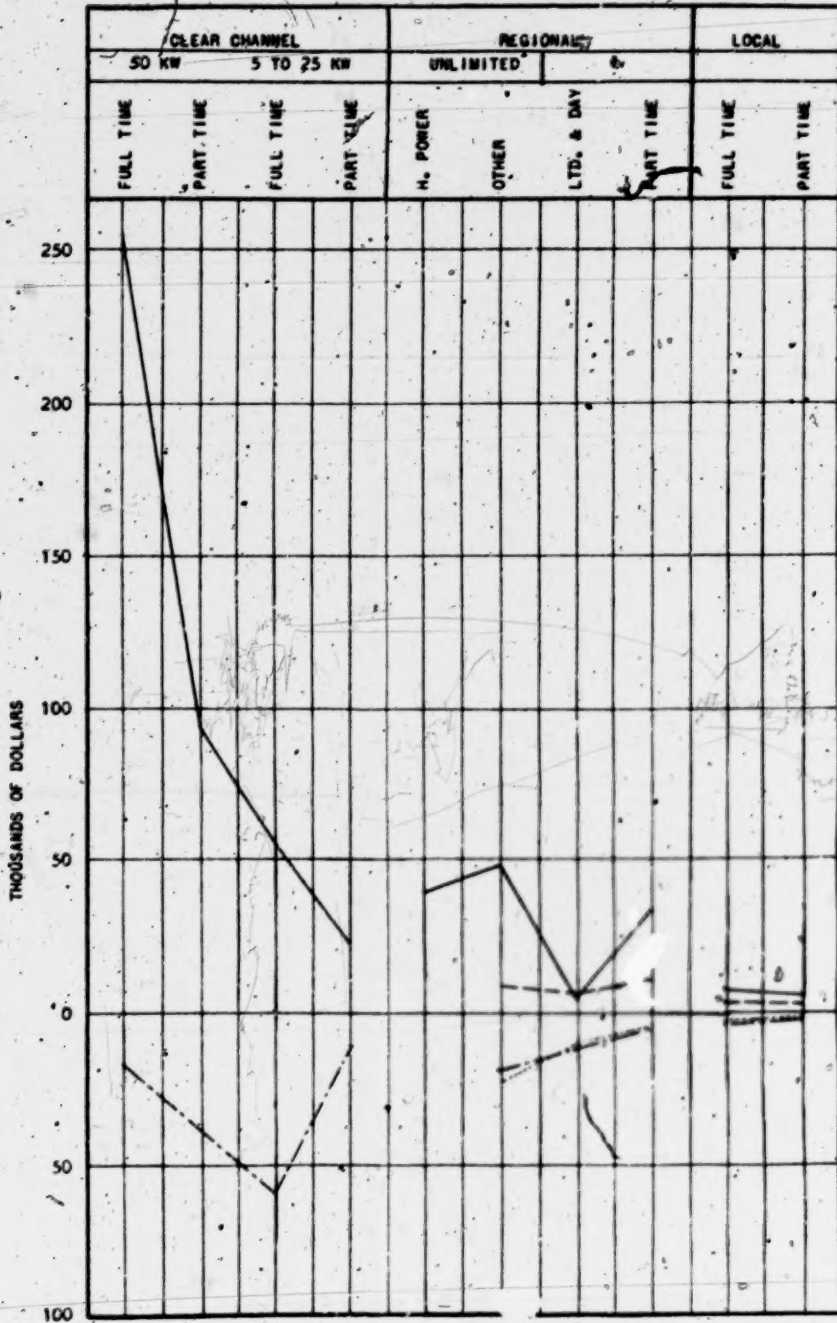


KEY

- STATIONS WITH A PROFIT SERVING
- - - STATIONS WITH A PROFIT NOT SERVING
- . - STATIONS WITH A LOSS SERVING
- . . . STATIONS WITH A LOSS NOT SERVING

AVERAGE BROADCAST INCOME COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS
1938

TABLE IV B



U. S. GOVERNMENT PRINTING OFFICE : 1941 — O-313425

(Follows p. 139) No. 5

G AS OUTLETS FOR MAJOR NETWORKS
RVING AS OUTLETS FOR MAJOR NETWORKS
AS OUTLETS FOR MAJOR NETWORKS
ING AS OUTLETS FOR MAJOR NETWORKS

TABLE V A—Average revenues and average broadcast income, 660 stations according to major network service in the relative classes of market areas shown by class of stations according to profit or loss, 1938

Class of station	Stations with a profit				Stations with a loss				Total stations in area				Stations with a profit				Stations with a loss				Total stations in area			
	Major network		No major network		Major network		No major network		Major network		No major network		Major network		No major network		Major network		No major network		Total			
	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Major network	No major network		
Clear channel: 50,000 watts: Unlimited Part-time	23	(R \$805,000) (L 296,967)	3	(R 481,538) (L 81,164)	1	(R \$1,080,785) (L 17,224)	24	(R \$517,152) (L 118,490)	7	(R 304,358) (L 140,602)	3	(R 195,820) (L 27,973)	24	(R 467,769) (L 146,602)	1	(R 304,358) (L 140,602)	1	(R 304,358) (L 140,602)	1	(R 304,358) (L 140,602)	1	(R 304,358) (L 140,602)	7	1
	6	(R 271,576) (L 83,175)	3	(R 140,865) (L 60,976)	3	(R 140,865) (L 60,976)	9	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	9	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	4	(R 195,820) (L 27,973)	4	4
Regional: Unlimited: High power Other Limited and day Part-time	4	(R 319,266) (L 52,526)	10	(R 298,936) (L 79,797)	11	(R 153,863) (L 39,092)	61	(R 434,520) (L 34,724)	59	(R 146,769) (L 30,680)	2	(R 146,769) (L 30,680)	80	(R 434,520) (L 34,724)	15	(R 83,942) (L 12,183)	1	(R 83,942) (L 12,183)	1	(R 83,942) (L 12,183)	1	(R 83,942) (L 12,183)	74	4
	30	(R 79,797) (L 1,179)	13	(R 80,402) (L 1,179)	1	(R 120,453) (L 25,595)	3	(R 66,103) (L 19,459)	4	(R 61,729) (L 8,825)	10	(R 54,998) (L 6,963)	20	(R 54,998) (L 6,963)	4	(R 59,819) (L 9,767)	6	(R 38,254) (L 11,632)	8	(R 38,254) (L 11,632)	16	3		
	2	(R 140,267) (L 1,179)	13	(R 80,402) (L 1,179)	1	(R 120,453) (L 25,595)	3	(R 66,103) (L 19,459)	4	(R 61,729) (L 8,825)	10	(R 54,998) (L 6,963)	20	(R 54,998) (L 6,963)	4	(R 59,819) (L 9,767)	6	(R 38,254) (L 11,632)	8	(R 38,254) (L 11,632)	16	7		
	1	(R 426,322) (L 183,377)	9	(R 133,177) (L 11,999)	2	(R 75,081) (L 3,701)	3	(R 62,752) (L 3,701)	6	(R 110,666) (L 13,717)	1	(R 110,666) (L 13,717)	16	(R 110,666) (L 13,717)	3	(R 30,287) (L 10,687)	3	(R 28,345) (L 4,239)	9	(R 28,345) (L 4,239)	13	4		
Local: Unlimited Day and part-time Total	3	(R 110,654) (L 16,672)	12	(R 73,673) (L 6,438)	2	(R 25,731) (L 5,647)	5	(R 83,551) (L 5,798)	28	(R 60,934) (L 23,354)	13	(R 40,934) (L 23,354)	28	(R 60,934) (L 23,354)	19	(R 41,010) (L 3,375)	18	(R 29,900) (L 3,708)	47	(R 29,900) (L 3,708)	31	70		
	3	(R 110,654) (L 16,672)	12	(R 73,673) (L 6,438)	2	(R 25,731) (L 5,647)	5	(R 83,551) (L 5,798)	28	(R 60,934) (L 23,354)	13	(R 40,934) (L 23,354)	28	(R 60,934) (L 23,354)	19	(R 41,010) (L 3,375)	18	(R 29,900) (L 3,708)	47	31				
	92	(R 422,328) (L 130,527)	52	(R 104,273) (L 9,565)	20	(R 182,708) (L 33,028)	40	(R 71,833) (L 14,179)	117	(R 142,902) (L 29,613)	34	(R 40,461) (L 4,277)	117	(R 142,902) (L 29,613)	43	(R 57,084) (L 9,544)	36	(R 28,679) (L 5,028)	160	(R 28,679) (L 5,028)	70	230		

TABLE V B.—Average broadcast revenues and average broadcast income 660 stations according to profit or loss, shown by classes of stations

1938

Class of station	420 stations with a profit					240 stations with a loss					660 stations				
	Stations			Averages		Stations			Averages		Major net-work			No major network	
	Major net-work	No. major network	Total	Major net-work	No. major network	All stations	Major net-work	No. major network	Total	Major net-work	No. major network	Averages	Number stations	Averages	Number stations
Clear channel: 50,000 watts: Unlimited	30	30	(R \$737,904 L 255,322 I 437,243 I 96,024	(R \$737,904 L 255,322 I 437,243 I 96,024	1	(R \$1,196,785 L 17,224	(R \$752,384 L 246,530 I 437,243 I 96,024	31	(R \$1,196,785 L 17,224	(R \$752,384 L 246,530 I 437,243 I 96,024	34	(R \$752,384 L 246,530 I 437,243 I 96,024	(R \$110,559 L 5,210 I 49,706 L 1,132 I 88,706 L 3,613	(R \$752,384 L 246,530 I 437,243 I 96,024	(R \$110,559 L 5,210 I 49,706 L 1,132 I 88,706 L 3,613
Part-time	4	4	(R 296,572 L 56,001 I 146,770 I 22,213	(R 296,572 L 56,001 I 146,770 I 22,213	3	(R 149,865 L 60,976 I 88,866 L 12,712	(R 210,135 L 30,935 I 132,301 I 13,482	14	(R 149,865 L 60,976 I 88,866 L 12,712	(R 210,135 L 30,935 I 132,301 I 13,482	14	(R 210,135 L 30,935 I 132,301 I 13,482	(R 210,135 L 30,935 I 132,301 I 13,482	(R 210,135 L 30,935 I 132,301 I 13,482	(R 210,135 L 30,935 I 132,301 I 13,482
5,000 to 25,000 watts: Unlimited	11	11	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	8	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	8	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	8	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757
Regional: Unlimited:	8	8	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	34	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	34	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	34	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757
High power	127	17	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	5	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	5	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	5	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757
Other	7	32	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	29	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	29	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	29	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757
Limited and day	8	10	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	15	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	15	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	15	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757
Part-time	8	10	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	(R 236,217 L 39,704 I 192,543 I 47,246 I 83,065 I 6,599 I 143,374 I 34,596	7	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	7	(R 98,029 L 19,768 I 71,945 L 12,932 I 42,959 L 5,697	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	7	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757	(R 236,217 L 39,704 I 172,820 L 33,064 I 78,782 I 2,122 I 96,513 I 15,757

TABLE VI.—Average broadcast revenues and average broadcast income of 350 stations serving as outlets for major networks distributed by classes of stations according to profit and loss.

1938

Particulars	Stations showing profit			Stations showing loss			Number stations	Total average total broadcast revenues	Average broadcast income
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income			
1	2	3	4	5	6	7	8	9	10
Area 1:									
Clear channel, unlimited, 50,000 watts or more	23	\$805,000	\$296,967	1	\$1,156,785	\$117,224			
Clear channel, part-time, 50,000 watts or more	3	481,538	81,164	None					
Clear channel, unlimited, 5,000 to 25,000 watts	6	274,576	83,175	3	140,865	460,976			
Clear channel, part-time, 5,000 to 25,000 watts	None			None					
Regional, unlimited, high power	4	310,299	52,526	None					
Regional, unlimited, other than high power	50	298,936	79,797	11	153,863	439,092			
Regional, limited and day	2	140,267	1,179	1	120,455	25,595			
Regional, part-time	1	426,522	183,377	2	76,681	1,751			
Local, unlimited	3	110,654	16,672	2	25,731	4647			
Local, day and part-time	None			None					
Total	92	422,328	130,527	20	182,708	433,028			
Area 2:									
Clear channel, unlimited, 50,000 watts or more	7	517,152	118,400	None					
Clear channel, part-time, 50,000 watts or more	1	304,358	140,602	None					
Clear channel, unlimited, 5,000 to 25,000 watts	4	195,850	27,972	None					
Clear channel, part-time, 5,000 to 25,000 watts	2	196,081	32,765	1	88,806	412,712			
Regional, unlimited, high power	4	153,135	26,883	None					
Regional, unlimited, other than high power	59	140,769	30,680	15	83,942	412,183			
Regional, limited and day	4	61,729	8,825	4	59,819	9,767			
Regional, part-time	6	110,666	13,717	3	30,287	10,687			
Local, unlimited	28	60,934	9,354	19	41,010	5,375			
Local, day and part-time	2	42,203	10,039	1	23,122	9,544			
Total	117	142,902	29,613	43	57,684	9,006			
Area 3:									
Clear channel, unlimited, 50,000 watts or more	None			None					
Clear channel, part-time, 50,000 watts or more	None			None					
Clear channel, unlimited, 5,000 to 25,000 watts	1	79,438	5,070	None					
Clear channel, part-time, 5,000 to 25,000 watts	None			None					
Regional, unlimited, high power	None			None					
Regional, unlimited, other than high power	16	63,275	11,729	5	40,749	4,866			
Regional, limited and day	None			None					
Regional, part-time	None			None					
Local, unlimited	18	38,574	6,600	9	28,790	4,006			
Local, day and part-time	None			4	19,455	1,782			
Total	35	51,948	8,901	18	30,008	3,751			

* Represents loss

TABLE VI.—Average broadcast revenues and average broadcast income of 350 stations serving as outlets for major networks distributed by classes of stations according to profit and loss—Continued.

1938

Particulars	Stations showing profit			Stations showing loss			Number stations	Total average total broadcast revenues	Average broadcast income
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income			
1	2	3	4	5	6	7	8	9	10
Area 4:									
Clear channel, unlimited, 50,000 watts or more	None			None					
Clear channel, part-time, 50,000 watts or more	None			None					
Clear channel, unlimited, 5,000 to 25,000 watts	None			None					
Clear channel, part-time, 5,000 to 25,000 watts	1	48,176	1,109	None					
Regional, unlimited, high power	None			None					
Regional, unlimited, other than high power	2	97,251	6,309	3	59,207	\$11,674			
Regional, limited and day	1	58,205	1,539	None					
Regional, part-time	1	56,474	11,007	2	28,244	\$2,159			
Local, unlimited	7	29,125	2,728	5	16,769	\$6,825			
Local, day and part-time	2	24,934	4,956	1	16,455	\$5,848			
Total	14	43,652	3,947	11	30,401	\$7,208			
Summary:									
Clear channel, unlimited, 50,000 watts or more	30	737,904	256,322	1	186,785	\$17,224	31	\$752,384	\$246,530
Clear channel, part-time, 50,000 watts or more	4	437,243	96,024	None			4	437,243	96,024
Clear channel, unlimited, 5,000 to 25,000 watts	11	226,572	56,001	3	149,865	\$60,976	14	210,135	30,985
Clear channel, part-time, 5,000 to 25,000 watts	3	146,779	23,213	1	88,866	\$12,712	4	132,301	13,482
Regional, unlimited, high power	8	236,217	39,704	None			8	236,217	39,704
Regional, unlimited, other than high power	127	192,843	47,246	34	98,029	\$19,768	161	172,820	33,094
Regional, limited and day	7	83,065	5,590	5	71,945	\$12,932	12	78,782	\$2,122
Regional, part-time	8	143,374	34,586	7	42,959	\$5,697	15	96,513	16,787
Local, unlimited	56	82,434	8,033	35	33,531	\$4,960	91	45,164	3,036
Local, day and part-time	4	33,613	7,508	6	19,566	\$3,748	10	25,185	754
Total	258	224,818	61,396	92	76,192	\$12,887	350	185,730	41,870

* Represents loss.

TABLE VII.—Average broadcast revenues and average broadcast income 310
stations not serving as outlets for major networks distributed by classes of stations
according to profit and loss

1938

Particulars	Stations showing profit			Stations showing loss			Number stations	Total average total broadcast revenues	Average broadcast income
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income			
1	2	3	4	5	6	7	8	9	10
Area 1:									
Regional, unlimited, other than high power	10	\$206,986	\$14,013	9	\$134,520	\$34,724			
Regional, limited and day	13	80,402	9,781	7	66,103	19,459			
Regional, part-time	9	133,177	11,999	4	62,752	3,701			
Local, unlimited	12	73,673	6,438	8	83,551	2,786			
Local, day and part- time	8	28,053	4,483	12	23,376	4,780			
Total	52	104,273	9,565	40	71,833	14,179			
Area 2:									
Regional, unlimited, other than high power	2	42,150	2,792	1	76,011	1,223			
Regional, limited and day	10	54,996	6,993	6	38,254	11,632			
Regional, part-time	1	18,511	1,342	3	28,345	4,239			
Local, unlimited	13	36,133	3,290	18	29,900	3,708			
Local, day and part- time	8	31,643	3,223	8	12,847	3,829			
Total	34	40,461	4,277	36	28,679	5,028			
Area 3:									
Regional, unlimited, other than high power	2	26,691	1,400	5	29,187	5,951			
Regional, limited and day	5	42,769	3,006	7	19,344	3,152			
Regional, part-time	20	31,943	4,725	28	21,485	3,555			
Local, unlimited	9	29,489	4,044	4	20,118	2,623			
Local, day and part- time	36	32,541	4,131	44	21,806	3,969			
Total	36	32,541	4,131	44	21,806	3,969			
Area 4:									
Regional, unlimited, other than high power	3	21,406	3,519	2	26,862	905			
Regional, limited and day	4	23,706	1,001	4	13,837	12,856			
Regional, part-time	23	19,978	2,499	14	16,765	16,786			
Local, unlimited	10	15,851	2,493	7	15,943	714			
Local, day and part- time	40	19,426	2,424	28	17,878	4,256			
Total	40	19,426	2,424	28	17,878	4,256			
Summary:									
Regional, unlimited, other than high power	17	133,633	9,886	17	87,485	20,306	34	\$110,559	\$5,210
Regional, limited and day	32	59,496	6,754	24	36,792	11,645	56	49,766	1,132
Regional, part-time	10	121,710	10,933	8	47,654	5,538	18	88,796	3,613
Local, unlimited	68	36,061	4,000	68	30,043	3,899	136	33,052	51
Local, day and part- time	35	25,757	3,513	31	18,560	3,338	66	22,376	295
Total	162	53,990	5,485	148	36,282	7,041	310	45,536	481

* Represents loss.

TABLE VIII.—Broadcast revenue and income in relation to major network service

1938

Item	Network system station group	Number stations	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (per cent)
1	2	3	4	5	6
1	Columbia Broadcasting System, Inc., and stations serving it exclusively. (See Table IX)	104	\$33,198,850	\$7,410,976	24.1
2	National Broadcasting Company, Inc., and stations serving it exclusively. (See Table IX)	116	42,518,060	8,072,737	21.2
3	Mutual Broadcasting System, Inc., and stations serving it exclusively. (See Table IX)	19	5,475,298	385,405	7.0
4	Stations serving 2 or more networks, including 1 major network or more. (See Table IX)	141	16,050,047	3,134,773	21.6
5	Total for major network systems	350	97,242,255	19,003,891	21.7
6	Stations not serving any major network (including 305 which served no network)	310	14,116,123	149,107	1.1
7	Four regional networks ¹		549,513	67,509	13.5
8	Total for the industry	660	111,907,891	18,922,353	18.7

¹ Not included in FCC published tabulations for 1938 (Release No. 34737-1).² Represents loss.

TABLE IX.—Broadcast revenue and income Major network Systems

1938

Item	Major network system	Number stations	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (per cent)
1	2	3	4	5	6
1	(a) Columbia Broadcasting System, Inc., and Stations licensed to it	9	\$18,472,198	\$4,303,249	25.8
	(b) Stations serving CBS exclusively	95	14,726,652	3,107,727	22.2
2	(a) National Broadcasting Company, Inc., and stations licensed to it	10	23,403,765	3,548,489	17.5
	(b) Stations licensed to others but operated for NBC	5	2,466,961	537,436	23.8
3	(c) Stations serving NBC exclusively	101	16,645,374	3,996,812	25.7
	(a) Mutual Broadcasting System, Inc. (No Stations licensed to or operated for it)		100,486	3,283	30.2
	(b) Stations serving MBS exclusively	19	14,880,461	355,022	8.5
4	(a) Stations serving CBS and other networks	10	1,361,767	134,170	10.4
	(b) Stations serving NBC and other networks	46	11,459,443	2,893,234	28.6
	(c) Stations serving MBS and other networks	55	3,228,837	107,369	3.5

¹ Does not include \$494,351 contributed by members in liquidation of operating deficits.

TABLE X.—Relative financial results of operation major network systems and other groups

1938.

Item	Network system or station group	Number stations	Broadcast revenue		Broadcast income	
			Amount	Ratio to industry total %	Amount	Ratio to industry total %
1	2	3	4	5	6	7
1	(a) Columbia Broadcasting System, Inc. and stations licensed to it	9	\$18,472,198	16.4	\$4,303,249	22.50
	(b) Stations serving CBS exclusively	95	14,726,632	13.2	3,107,727	16.30
	(c) Received from CBS by 10 stations serving CBS and 1 other network or more		329,022	0.3	164,400	0.34
	(d) Total CBS system business		33,527,852	29.9	7,475,376	39.14
2	(a) National Broadcasting Company, Incorporated and stations licensed to it	10	23,405,735	20.9	3,548,489	18.60
	(b) Stations licensed to others but operated for NBC	5	2,466,951	2.2	537,436	2.81
	(c) Stations serving NBC exclusively	101	16,643,374	14.8	3,986,812	21.06
	(d) Received from NBC by 46 stations serving NBC and 1 other network or more		3,537,393	3.2	1,668,600	3.64
	(e) Total NBC system business		46,053,453	41.1	8,761,337	46.02
3	(a) Mutual Broadcasting System, Inc. (no stations licensed to or operated for it)		1,594,837	0.6	30,383	0.18
	(b) Stations serving MBS exclusively	19	4,880,461	4.3	355,022	1.65
	(c) Received from MBS by 55 stations serving MBS and 1 other network or more		550,556	0.5	107,000	0.65
	(d) Total MBS system business		6,025,854	5.4	492,405	2.48
4	Stations serving 1 major network or more and also 1 other network or more, excluding amounts received from major networks, showing business derived from their own efforts	111	11,633,076	10.4	2,274,773	12.00
5	Four regional networks ¹		549,513	0.5	67,569	0.36
6	Stations not serving any major network (including 305 which served no network)	310	14,116,123	12.7	4,149,107	
7	Total for the industry	660	111,907,891	100.0	18,922,353	100.00

¹ Apportioned in the ratio which major network revenue bears to total revenue, the remainder being allocated to the non-major network business of the 111 stations.

² Includes \$494,351 which was not revenue from the operating point of view, since it represented contributions by members in liquidation of operating deficits.

³ Not included in FCC published tabulations for 1938 (Release No. 34737-1).

⁴ Represents loss.

TABLE XI.—Relative financial results of operation, separately for station and network operations

1938

Item	Station group or network	Number sta- tions	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (percent)
1	2	3	4	5	6
1	Stations showing profit:				
	(a) Serving as outlets for major networks	258	\$58,002,568	\$15,840,040	27.2
	(b) Not serving as outlets for major networks (in- cluding 161 which served no network)	162	8,746,374	888,493	10.1
	(c) Total showing profit	420	66,749,342	16,728,533	25.0
2	Stations showing loss:				
	(a) Serving as outlets for major networks	92	7,009,699	* 1,185,595	
	(b) Not serving as outlets for major networks (in- cluding 144 which served no network)	148	5,369,749	* 1,037,600	
	(c) Total showing loss	240	12,379,418	* 2,223,195	
3	Total station operation	660	79,128,760	14,505,338	18.3
4	Network operation:				
	(a) Columbia Broadcasting System		12,812,587	2,541,721	20.0
	(b) National Broadcasting Company		18,822,194	1,777,342	9.3
	(c) Mutual Broadcasting System		1,594,837	30,383	5.1
	(d) Four regional networks		549,513	67,569	12.3
	(e) Total network operation		32,779,131	4,417,015	13.6
5	Total for the industry	660	111,907,891	18,922,353	16.9

¹ Includes \$494,351 which was not revenue from the operating point of view, since it represented contributions by members in liquidation of operating deficits.

* Represents loss.

TABLE XII.—Relative distribution of revenue and income dollar separately for station and network operation

Item	Station group or network	Number stations	Broadcast revenue dollar	Broadcast income dollar	
				Distribution	Ratio to industry total (percent)
1	2	3	4	5	6
1	Stations showing profit:				
	(a) Serving as outlets for major networks	238	31.8	83.7	74
	(b) Not serving as outlets for major networks (including 161 which served no network)	162	7.8	4.7	
	(c) Total showing profit	420	59.6	88.4	79
2	Stations showing loss:				
	(a) Serving as outlets for major networks	92	6.3	6.3	
	(b) Not serving as outlets for major networks (including 144 which served no network)	143	4.7	5.5	
	(c) Total showing loss	240	11.0	11.8	
3	Total station operation	660	70.6	76.6	
4	Network operation:				
	(a) Columbia Broadcasting System		11.90	13.50	12.00
	(b) National Broadcasting Company		16.80	9.40	8.54
	(c) Mutual Broadcasting System		.52	.15	.14
	(d) 4 regional networks		.48	.35	.32
	(e) Total network operation		29.40	23.40	21.00
5	Total for the industry	660	100.00	100.00	100.00

* Represents loss.

TABLE XIII.—Condensed summary of broadcast income of selected networks and groups of stations, 1938

Item	Particulars	Number stations	Net time sales	Per cent of total	Total broadcast revenues	Per cent of total	Broadcast expenses	Per cent of total	Broadcast income	Percent of total	Ratio of net income to net time sales (per cent)
1	2	3	4	5	6	7	8	9	10	11	12
1	Columbia Broadcasting System, Inc	9	\$18,682,383	16.5	\$18,472,198	16.4	\$14,168,949	15.2	\$4,303,249	22.7	21.2
2	Mutual Broadcasting System, Inc	None	100,446	1	594,837	0.5	594,454	0.6	30,383	0.2	0
3	National Broadcasting Company, Inc	15	22,582,449	22.3	25,872,686	23.1	21,786,761	23.5	4,085,924	20.8	15.2
4	Regional network companies	15	3,272,400	3.2	3,794,058	3.4	3,333,670	3.6	460,388	2.4	(See 8)
5	Stations serving as outlets for NBC only	101	15,555,539	15.3	16,645,374	14.9	12,638,562	13.6	3,986,812	21.1	14.1
6	Stations serving as outlets for CBS only	95	14,096,806	13.8	14,726,652	13.2	11,618,925	12.5	3,107,727	16.4	18.3
7	Stations serving as outlets for Mutual only	19	4,177,729	4.1	4,880,461	4.4	4,525,439	4.9	355,022	1.9	8.3
8	Stations serving as outlets for more than one network (other than those shown on Line 4 above) only	96	11,750,987	11.6	12,805,502	11.4	10,063,548	10.8	2,741,954	14.5	9.8
9	Stations serving as outlets for regional networks only	5	417,445	.4	623,781	.6	414,781	.8	141,781	7.3	(Loss)
10	Stations not serving as outlets for any network	303	12,842,413	12.7	13,492,342	12.1	13,499,668	14.5	47,336	0.2	(Loss)
11	Total		101,393,137	100.0	111,907,891	100.0	92,985,538	100.0	18,922,353	100.0	

¹ Shown as profit but actually represent excess of contributions over expenses.

² Includes \$88,178 net expense of operating these stations incurred by their licensees, namely, General Electric Company and Westinghouse Electric and Manufacturing Company.

³ Represents loss.

¹ Based on representative samples for the itemized categories. If the category includes more than 1 licensee or company. The term refers to income available for divisions.

² While serving exclusively as outlets for CBS and NBC, some of the stations showed revenue from regional networks. This actually was revenue from sales of station time to stations in "hook-ups" such as Texas Quality Network, which is not a regional network, but the revenue of the stations in the "hook-up" is from regional chain or network service.

[fol. 197] EXHIBIT "E" TO COMPLAINT

Supplemental Report on Chain Broadcasting

(October 11, 1941)

By the Commission

(Chairman Fly, Commissioners Walker, Payne and Wakefield; Commissioners Case and Craven dissenting)

[fol. 198] On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting accompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.¹ On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment period mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution² which called for a study of the Commis-

¹ *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May, 1941.

² Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effects of the regulations upon the broadcasting industry and of the authority of the Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

sion's Chain Broadcasting Regulations. During July and August, following these hearings, representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and, in the later stages, with Commissioner Walker. Representatives of some of the regional networks and some of the affiliates also conferred with members of the Commission and its staff during this period.³ These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon [fol. 199] the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in

³Cf. Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess. (1941), pages 35-42.

effect with respect to existing affiliation contracts, or network organization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed.' Oral arguments on the Mutual petition were heard before the Commission *en banc* on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and [fol. 200] the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

[fol. 201] Regulation 3.104. No license shall be granted to a standard broadcast station which options¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours² within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

[fol. 202] Territorial Exclusivity

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station.

¹ As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

In order to clarify the meaning of Regulation 3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning¹ of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

[fol. 203] Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will bring an increased measure of stability to the broadcast industry without any detrimental results. By separate action taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations

¹ In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

which have entered into affiliation contracts whose term is not longer than two years. In its report, the Commission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network-station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, [fol. 204] what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

[fol. 205]

Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and CBS utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; and 11 p. m. to 8 a. m. A station is permitted to option up to three hours during each segment to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours; for, if a roving option

were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specific hours within each of the important three segments of the broadcast day,—[fol. 207] morning, afternoon, and evening, a station may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p. m. to 8 a. m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits specified in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way

over local and national non-network programs during the time under option. But during at least two specified hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option.

The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear

time over a number of stations for a network program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to sell or option time, included within the non-exclusive option period but not actually being utilized for a network commercial program, to one or more other network organizations.

[fol. 209]. After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial

program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

[fol. 210] Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be granted to a ~~standard broadcast~~ station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

[fol. 211] Other considerations have motivated the Commission in this decision. The Commission is desirous of

seeing that the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

[fol. 212].

Conclusion

The Commission adheres to the views expressed in its Report on Chain Broadcasting. It is of the opinion that the chain broadcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reason stated at pages 77 to 79 of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation.

[fol. 213] Federal Communications Commission

Washington, D. C.

October 11, 1941

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It is ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, be and the same is hereby, amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

[fol. 214] Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than

two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options ¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours ² within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or net-[fol. 215] work organization station licenses, the effective

¹ As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

[fol. 216] Dissenting Opinion of Commissioners Norman S. Case and T. A. M. Craven

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these basic national economic readjustments upon

the radio industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled by these new rules promulgated by the majority of this Commission. Any improvements which [fol. 217] may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country and, therefore, advocate that if any abuses of this nature exist they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvement of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings. If it be reasonable for an affiliate to contract for

first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate [fol. 218] station's time. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast station license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will serve public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case, T. A. M. Craven.

October 11, 1941.

[fol. 219]

EXHIBIT "F" TO COMPLAINT

Order in Docket No. 5060 as Issued May 2, 1941 and Amended October 11, 1941

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization¹ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

¹ The term "network organization," as used herein, includes national and regional network organizations.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

[fol. 220] 3.104. No license shall be granted to a standard broadcast station which options¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours² within each of four

¹ As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control⁴ with a network organization, [fols. 221-222] for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

⁴ The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than network's programs.

It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

[Vol. 223] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

SIRS:

Please Take Notice that the undersigned will bring the attached motion for a preliminary injunction and a temporary restraining order on for hearing before this Court in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, the City of New York, on the 7th day of November, 1941 at 10:30 o'clock A. M., or as soon thereafter as a statutory Court composed of three Judges can be convened, pursuant to the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws

of the United States, Title 28, Section 47) and counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, By John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. [fol. 224] Thomson, Wood and Hoffman, By John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, By Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To: Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C. Federal Communications Commission, Washington, D. C. Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, U. S. Court House, Foley Square, New York, New York.

[fol. 225] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION AND FOR TEMPORARY
RESTRAINING ORDER

Upon the verified Complaint in this action and the annexed affidavits of Niles Trammell, John J. Gillin, Jr., and Edward A. Hanover, Plaintiffs National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company move the Court:

(1) For a preliminary injunction in the above-entitled cause, temporarily restraining, enjoining and suspending, pending the final hearing and determination of this cause,

the Order of Defendant Federal Communications Commission, adopted and served upon May 2, 1941, as amended by the Order of said Commission adopted and served upon [fol. 226] October 11, 1941, in a proceeding before said Commission, identified as "In the matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060", in so far as the Order, as amended, purports to become effective on or before November 15, 1941, and also temporarily enjoining, pending such final hearing and determination, Defendants the United States and Federal Communications Commission, their respective agents, servants, employees, representatives, attorneys and all persons in active concert or participation with them, or any of them, from promulgating, publishing or holding out or causing or permitting to be promulgated, published or held out as effective or valid or authorized by law said Order, purporting to become effective as aforesaid; from, under the purported authority of said Order, revoking any license to operate a standard radio broadcast station now held by Plaintiffs, or any of them; and from, under the purported authority of said Order, threatening any standard broadcast station with loss or denial of such a license; and

(2) For a temporary restraining order in said cause, temporarily staying, suspending and enjoining, pending a hearing and determination upon the aforesaid motion for a preliminary injunction and for a period of 90 days thereafter, the operation, execution and enforcement of said Order purporting to become effective as aforesaid by any Defendant or any agent, servant, employee, representative or attorney of any Defendant or any person in active concert or participation with any of them; and

(3) For such other and further relief in the premises as to equity and justice may appertain and as may be deemed by the Court to be adequate and proper under the circumstances.

The grounds in support of this motion are as follows:

[fol. 227] 1. Unless restrained, Defendants will promulgate, publish and hold out as effective, valid and authorized by law said Order of the Federal Communications Commission, dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Com-

mission, Docket No. 5060." The Order as issued May 2, 1941 was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance of more than one network by a single network organization. The Order as amended, on October 11, 1941 was immediately effective except with respect to existing contracts, arrangements or understandings, network organization station licenses and the maintenance of more than one network by a single network organization. Insofar as the Order and the Order as amended were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and network organization station licenses and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization. Unless restrained the Defendants will, under the purported authority of the Order, instruct operators of standard broadcast stations who were not affiliated with Plaintiff National Broadcasting Company, Inc. on May 2, 1941, not to enter into affiliation contracts with said Plaintiff in the usual form under threat of revocation of their licenses or denial of any application for licenses or renewals thereof made by them; Defendants will, under the purported authority of the Order, on or after November 15, 1941, institute proceedings for the revocation of licenses to operate standard radio broadcast stations now held by Plaintiffs and [fol. 228] each of them; and Defendants will also thereunder take notice of and consider as operation contrary to the public interest, convenience and necessity, the operation of hundreds of standard broadcast stations, including those owned or operated by Plaintiffs Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, under affiliation contracts having certain provisions described in the Order, as more particularly set forth in the verified Complaint filed herein, and all as more fully set forth in the affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover, annexed hereto.

2. Immediate and irreparable injury, loss and damage will result to each of the Plaintiffs, and to the prejudice of the public, by reason of said action threatened by Defendants, as described in paragraph 1 hereof and more particularly set forth in the verified Complaint filed herein and the annexed affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover.

3. If Defendants take the action threatened by them as aforesaid in paragraph 1 hereof, any judgment which this Court may later render upon final determination of this cause will be ineffective.

4. If a preliminary injunction and a temporary restraining order be granted herein, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

5. No previous application has been made to any court for the relief sought herein.

Wright, Gordon, Zachry, Parlin & Cahill, By John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

[fol. 229] Thomson, Wood and Hoffman, By John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

Hill, Rivkins and Middleton, By Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., Of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 230.] IN UNITED STATES DISTRICT COURT FOR THE SOUTH-
ERN DISTRICT OF NEW YORK

[Title omitted].

AFFIDAVIT OF NILES TRAMMELL, PRESIDENT OF NATIONAL
BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

NILES TRAMMELL, being duly sworn, deposes and says:

I

Introduction

I am the President of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. I am familiar with the radio broadcasting business in general and with NBC's radio broadcasting and radio network broadcasting business in particular. I have read the verified Complaint herein and I am familiar with the fact therein stated. This affidavit is made in support of Plaintiffs' application for a preliminary restraining order suspending the operation, execution and enforcement of the [fol. 231] Order described in the Complaint, and in support of the application of the Plaintiffs herein for a temporary or interlocutory injunction.

II

The Order

On May 2, 1941, the Federal Communications Commission (hereinafter called the "Commission"), issued its Order in Docket No. 5060 (Exhibit D to the verified Complaint herein and hereinafter sometimes called "the original Order"). Two of the six Commissioners dissented. On October 11, 1941, the Commission (with two Commissioners dissenting) amended its Order in Docket No. 5060, and a copy of such amendment (hereinafter sometimes called "the Order on Rehearing") is Exhibit E to the verified Complaint herein. Said Order as amended (here-

inafter sometimes called "the Order") is summarized in paragraphs 28 to 40 of the verified Complaint, and is hereinafter more fully described. The original Order by its terms purported to become effective with respect to then existing contracts, arrangements and understandings, or network organization station licenses, 90 days thereafter, *i. e.*, on July 31, 1941, and purported to become effective in all other respects on May 2, 1941. On June 13, 1941, said Order was amended so as to defer its effective date with respect to the maintenance of more than one network by a single network organization until July 31, 1941. Said Order was further amended on July 22, 1941 so as to postpone its effective date until September 16, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and with respect to network organization station licenses and the maintenance of more than one network by a single network organization. On August 28, 1941, the effective date for the portions of said Order which were to have become effective on September 16, 1941 was changed to an indeterminate time to be fixed by the Commission on or after September 12, 1941. On October 11, 1941, the [fol. 232] effective date of such portions of said Order was fixed at November 15, 1941; that portion of said Order dealing with the ownership of more than one network by a single network organization was indefinitely suspended, subject to being made effective upon six months notice; and certain paragraphs of the original Order were amended in substance as set forth in the Complaint filed herewith and hereinafter more fully described. The Order of the Commission, this affidavit will show, has caused serious and irreparable injury to NBC and will continue to do so unless its enforcement be restrained.

III.

Description of Network Broadcasting

The radio service rendered in the United States today is dependent upon the efficient functioning of a complicated and balanced organization. The nature and extent of the injury to NBC and to the public which will result from the Commission's Order can only be explained after a brief reference to how broadcasting is conducted and financed in the United States.

In contrast to Europe, where the standard pattern for radio broadcasting is a Government monopoly paid for by a tax on receiving sets, radio broadcasting in the United States has been developed to its present high standard by private initiative subject to a minimum of Government regulation.

When radio broadcasting was beginning in this country during the early 1920's, utilization of the great technical advances made by the radio industry was endangered by the difficulty of finding a source of revenue to meet the heavy expenses of broadcasting. The problem was how to finance a day by day series of musical, cultural, educational and other programs without expense to the listening audience.

After some experimentation, this source of revenue was found in advertising. Advertisers have continued to furnish the money which today enables over 800 commercial [fol. 233] broadcasting stations to give the American people a broadcasting service unequalled elsewhere.

The fact that radio broadcasting is financed through advertising makes it necessary that broadcasting organizations be conducted in such a manner as to compete successfully with magazines, newspapers and other media seeking advertising revenue.

The local unit for broadcasting is the standard broadcast station which, in order adequately to serve the public interest, must carry its large capital investment, pay its expenses and earn its profits from the sale of broadcasting time to advertisers or to networks. The majority of such stations have a daily broadcasting schedule of 16 to 18 hours, 7 days a week, 52 weeks a year. This schedule makes necessary a constant flow of advertising contracts, programs, program talent, a high degree of engineering skill and unending planning. Such a station will enter into a contract with an advertiser to broadcast a particular program or series of programs over its facilities and derives its income from the sale of such service.

When only one station is involved, this transaction is relatively simple, but when the transaction involves the simultaneous broadcasting of the same program on a nation-wide scale over scores of independently owned stations the matter becomes an extremely complicated one.

Nothing short of clockwork precision suffices to effect the necessary changes in the line-up of stations between the

end of one network program and the commencement of the next. No end of painstaking planning and advance scheduling is required to operate a broadcasting network with station lineups constantly changing to meet the requirements of advertisers and a constant flow of accurately timed programs.

Commercial and Sustaining Programs: Programs paid for or "sponsored" by advertisers are known as "commercial" programs. In addition, it is necessary for broadcast stations in the intervals between commercial programs, and at times in place of them, to schedule so-called "sustaining" programs. Sustaining programs are not paid for by any advertiser but are furnished by the station or the network. To some extent these programs were originated because of the desirability of having a continuous broadcast schedule. Another reason for the use of sustaining programs was voluntary recognition on the part of broadcasters that programs of certain types, such as religious programs, informative programs furnished by various governmental agencies and certain programs involving discussions of political principles and other controversial issues, were not suited to advertising sponsorship. The use of high types of sustaining programs also creates good will for the station and induces people to become accustomed to listen to certain stations in preference to others.

Circulation: What a station has to sell to an advertiser is "circulation", which is produced by two factors. The first is the station's coverage, which may be defined as the number of radio families (i. e., families having radio sets) which can satisfactorily hear the programs broadcast by that station. Coverage is dependent upon the power and the frequency of the station, the physical nature of the terrain surrounding the station and the number of radio families in its vicinity. There are in the United States today three national network organizations, NBC, Columbia Broadcasting System, Inc. (hereinafter called CBS) and Mutual Broadcasting System, Inc. (hereinafter called Mutual). NBC, the oldest of the three, was organized in 1926 prior to the creation of the Federal Communications Commission or its predecessor the Federal Radio Commission.

Radio Station WJZ, which NBC acquired from Radio Corporation of America, its parent company, first became the sole property of Radio Corporation of America on or about May 15, 1923.

For a period of three or four years subsequent to its acquisition of Station WJZ, Radio Corporation of America operated this station without the support of any advertising revenue whatsoever.

Radio Corporation of America as early as 1923 connected Station WGY, Schenectady, with Station WJZ by wireline, thereby making its first network broadcast. This network which subsequently developed into the present Blue network was taken over by NBC upon its organization in 1926. At that time NBC also began operating the network known as its Red network. The second factor is the popularity of the programs broadcast by the station and all of the other elements creating good will for the station.

The combination of these factors determines the number of people who will be likely to hear a particular program, i. e., circulation. When a station is affiliated with a network, its circulation is increased by reason of the good will built up over a period of years by the network organization. The great majority of stations regard their network affiliation as one of their most valuable assets.

Network Broadcasting: Network broadcasting is the simultaneous broadcasting by two or more connected radio stations of the same program.

[fol. 235] In the usual course, a network program is staged or originated in the studios of the network organization and is transmitted to the stations on the network by means of telephone lines leased from the telephone company by the network organization. Because of the speed with which electricity travels each station on the network is enabled to broadcast the program simultaneously.

It is network broadcasting that enables nation-wide broadcasting to be effected and that reflects the national aspects of the radio industry as distinguished from those of purely local character and significance. The average local station is incapable of selling enough advertising locally to round out its broadcasting schedule with commercial or sustaining programs in any way comparable with the quality of those furnished by the national network organizations.

This conclusion is confirmed by the unanimous result of surveys of all types relied upon in the broadcasting trade indicating that the audience of a radio station with a network affiliation is greater than that of a comparable station without such affiliation.

The 310 standard broadcast stations not affiliated with any network in 1938 operated at an aggregate loss of \$149,107 in that year, 162 of them showing net incomes aggregating \$888,493 and 148 of them showing net losses aggregating \$1,037,600.

As a matter of history, nationwide network broadcasting owes its growth to the demand by standard broadcast stations for an adequate programming service, which, at least with respect to less favorably situated standard broadcast stations, is obtainable only through a national network drawing upon the great talent centers of the nation.

The development of some form of national network broadcasting was also a necessary corollary to radio's attempt to compete effectively for the advertiser's dollar—since it is a matter of common knowledge that a substantial number of American industries make standard products for national distribution and advertise such products nation-[fol. 236] ally in magazines and other printed media having a national circulation.

It is this national advertising which makes possible the nation-wide network broadcasting of both commercial and sustaining programs of a higher quality than is possible with the resources of any individual station.

There are grave limitations on the type of service which an individual station can furnish. The programs originated by local stations are of necessity representative of the locality and not of the nation at large. What is more, no network which confines its broadcasts solely to such programs can do more than represent various separate localities. It cannot give the broader, more homogeneous national service necessary to the development and preservation of national unity and national culture, and to the enlightenment of the people with respect to problems affecting the nation as a whole.

The development of some form of nation-wide network broadcasting through a national organization was made inevitable by this limitation of the local broadcasting services, which could never be regarded as satisfying the need for a nationwide service.

Existing Networks and Network Organizations: NBC's [fol. 237] Red and Blue networks were the first two networks in operation with national coverage and were pioneered by NBC at a time when there was no one else in the field with the foresight, courage and enterprise to engage in

national network broadcasting. It took bold money, guts and brains to build in a field which was then new and hazardous. NBC invited competition at the outset and, in 1927, it welcomed the organization of CBS.

Between 1927 and 1934, the pioneer years of nationwide network broadcasting, the people of the United States relied upon NBC's Red and Blue networks and the CBS network for their national radio service. This service was developed and expanded throughout the worst years of the greatest depression this country has known. The value of the public service which was rendered during those years is incalculable.

Ultimately, in 1934, the Mutual Broadcasting System was organized and it attained a national status in 1936. The three existing national network organizations, therefore, presently operate four national networks, i.e., the NBC Blue, the NBC Red, CBS and Mutual.

Each of NBC's networks renders a national radio coverage. Its ability to do so is facilitated by the fact that NBC is licensed to operate key stations for programs originated by NBC's network organization, which stations are supplemented by arrangements or contracts with independently operated radio stations enabling such programs to be broadcast over such independent stations.

The network broadcasting services rendered by NBC today are the product of fifteen years of informed experience. Its organization has been conditioned by the needs of its [fol. 238] growing, nation-wide business. NBC has a finely attuned organization for the conduct of a business that requires the precision of split-second timing.

At present both the network and the local standard broadcasting services are furnished by broadcast stations operating upon frequencies between 550 and 1600 kilocycles. In addition to these standard broadcast services, a distinct type of service is rendered by a number of powerful international broadcast stations situated in the United States. Although these stations may be heard within the United States, their primary audiences are located outside of its boundaries, in South America and in Europe. This service is expensive and it has a peculiar value in times of national emergency such as the present, but it is not commercially self supporting. As a result, NBC and CBS have furnished their contributions to this service out of revenues derived from standard broadcast operations.

Affiliation: Each of the three national network organizations owns, operates or controls relatively few stations. Out of a total of 70 stations affiliated with its Red network, 99 stations affiliated with its Blue network and 54 stations affiliated from time to time with one or the other of said networks, as of June 1, 1941, NBC owned and operated only 7 standard broadcast stations and leased and operated 3. Out of a total of 119 affiliated stations, as of June 1, 1941, Columbia owned and operated 7 standard broadcast stations and leased and operated 1. Mutual is a network organization owned in unequal proportions by a number of stockholders, each of which operates or controls a minimum of 1 standard broadcast station. As of June 1, 1941, Mutual had a total of 176 affiliates, including stockholders. In no case could the stations now owned, leased or operated by a network organization effect nation-wide broadcasting and satisfy the nation-wide needs of national advertisers.

In order to effect simultaneous nation-wide broadcasting it is necessary for the network organization to enter into arrangements with independently owned and operated [fol. 239] standard broadcast stations throughout the country whereby network programs can be broadcast over the facilities of such stations. An independently owned station which enters into such an arrangement with the network organization is known in the trade as an "affiliate" of the network organization, and the contract embodying the arrangement is known as an "affiliation" contract.

Thus, nationwide network services reach the radio audience as a result of cooperation between a network organization operating a few key stations and a large number of independently owned and operated standard broadcast stations affiliated with such network organization.

It must be remembered that there are many affiliates associated with each network organization (there being 99 on the NBC Blue alone) and each of these affiliates is, in addition to broadcasting network programs, engaged in the business of selling time for commercial programs to local advertisers and arranging his own schedule of local sustaining programs.

The significance of the affiliation contract between station and network organization is that it expresses the terms upon which the parties can cooperate to furnish a national broadcasting service without displacing the legitimate requirements of the local broadcasting services. These affilia-

tion contracts are not based upon theories or assumptions. They simply embody the working principles that have in practice resulted in a national and local radio service which has won general public approval and which is unequalled elsewhere.

Obviously, the value to an advertiser of time on or programs to be broadcast from any single station is far less than the value to him of time and programs to be broadcast on a national network, and consequently he spends larger amounts of money for the national service and for the programs to be used thereon. This difference is reflected in the overall standard of service furnished by local stations as compared to national networks. It is also obvious that the quality of local service furnished by a powerful station in a metropolitan area varies widely from [fol. 240] that furnished by a small station in a rural area, mainly because of the different value of the respective stations to advertisers. Network broadcasting equalizes these differences, since the small rural station and the powerful metropolitan station broadcast the same network program at the same time to the advantage of the less fortunately situated communities.

A national network raises operating problems which are infinitely more complex than those encountered in the operation of a single station. For example, national advertising involves the expenditure of large sums of money, both for station time and for program talent. Magazines and newspapers offer to such advertisers advance assurance of the circulation they desire in the markets wherein they sell throughout the period of an advertising campaign. To successfully compete with these other advertising media, the national networks must be able to offer a reasonable assurance of circulation, but in order to do so, they must be able to clear specified periods of time on many radio stations, each of which is simultaneously preparing its own schedule of local commercial and sustaining programs.

The efficiency of current broadcasting operations is traceable directly to the operation of key stations by the networks and to existing station-network affiliation contracts embodying the principles which have in practice produced our present high standard of nation-wide broadcasting services.

Affiliation Contracts: In most cases, NBC's contract of affiliation with independent stations provides in general that:

1. NBC will at its own expense pay for special telephone wirelines connecting the originating point of the program to the station.

2. The station grants NBC an option to sell certain specified periods of the station's time, exercisable on 28 days' notice. This means that any one purchasing a segment of [fol. 241] time from NBC, within the specified periods, for a program serving the public interest, convenience and necessity can be assured of full network circulation upon 28 days notice.

3. NBC will supply the station with a full schedule of sustaining programs, without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

4. As compensation for the network services rendered by NBC, including the furnishing of sustaining programs by NBC, the assumption of wireline charges and the service of selling the stations' time, NBC retains a certain portion, and pays the stations the balance, of the proceeds which it receives from advertisers for the sale of network time.

For the station, the affiliation contract is equivalent to a firm obligation to sell certain hours of its time on 28 days notice. In return, NBC must assume the expense of a wireline connection with the station, must undertake to provide suitable sustaining programs on a daily basis, and must sell enough time to national advertisers to support the entire structure.

Each of these provisions is based upon the reasonable needs of the service.

(a) *Wirelines:* When broadcast stations are connected for a network program, the connection is made with telephone wirelines which, because of the need for high fidelity transmission and the great distances involved, are extremely expensive to maintain. These connections are maintained between NBC and all of its affiliated stations throughout the broadcast day so that NBC may offer a continuous schedule of commercial and sustaining programs which will

be available to affiliated stations at any time in order to supplement their local offerings.

NBC endeavors so far as is reasonably possible to undertake in each of its affiliation contracts to assume the expense of such telephone wirelines between its network organization and the station on an annual basis. On the one hand, [fol. 242] this practice enables the stations to obtain network programs more readily because of their continuous availability. On the other, it places upon the network rather than upon the individual stations the risk, so far as wireline expense is concerned, that the network operations of the particular station will not be profitable in any given period.

The expense involved is by no means nominal. NBC's wireline expenses in 1940 aggregated in excess of \$3,600,000.

(b) *Network Optional Time*: The optional time provision is the balance wheel which regulates the cooperative efforts of the network organization and its affiliated stations in the production of a nationwide broadcasting service. It affects every aspect of the network business, including the relations between the network organizations and advertisers as well as the relations between the network organizations and affiliated stations.

As has been previously stated, the national advertiser negotiates for and buys radio time solely on a commercial basis. He will insist upon a national circulation and, if he cannot get it from the radio network, he will divert his money to newspapers, national magazines and other media, to the detriment of the radio service.

Such advertisers spend considerable sums on an advertising campaign, and there is keen competition for their business. The optional time provision in network affiliation contracts enables the network organizations to negotiate with such advertisers on the basis of an assured national coverage up to 28 days prior to the first program. It also enables the networks to enter into a contract with such advertisers as soon as the parties have agreed upon terms.

It must be remembered that NBC's Blue network, for example, has 99 affiliates, each of which is compiling daily its individual schedule of commercial and sustaining programs. Under such circumstances, there is every likelihood that NBC will find, upon investigating the possibility of scheduling a network program for a certain hour of a specific day, that a number of stations will have conflicting

commitments. In the absence of network optional time, the [fol. 243] unwillingness of a single station located in a market indispensable to an advertiser to accept a particular program would cause the advertiser to withdraw and would consequently defeat the desire of all of the other stations to carry that program.

At the present time, an advertiser using the Red network during the evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, in the absence of network optional time, each and every advertising contract negotiated for such hours on the Red network would require successful negotiation by NBC with a minimum of forty-four stations.

From the point of view of NBC's relations with advertisers, network optional time on a firm basis is a *siné qua non* of negotiation and contracting. The advertiser wants to know what he is buying before he buys it. If a tentative period of time is fixed for his program, but no contract can be entered into before forty-four or more stations have been contacted and the consent of each obtained, the advertiser may well have changed his mind. If stations refuse for any reason to clear time for the advertiser's program, he may refuse to consider a substitute period. Without optional network time, therefore, NBC must deal with advertisers on an "if, as and when" basis in competition with other media doing business on a firm basis.

From the point of view of NBC's relations with its affiliated stations, network optional time is necessary in order that the business may be conducted on a big enough scale to pay the out-of-pocket expenses thereof. As will hereinafter be more fully explained, NBC's expenses in 1940 for network and key station operations, exclusive of all international broadcasting or other non-standard broadcasting expenses, aggregated more than \$17,900,000. It is a human impossibility to obtain unanimity among the large number of necessary affiliates a sufficient number of times to carry this load.

[fol. 244] It must be remembered that the 8½ hours governed by network optional time leave ample periods within which stations can schedule local programs, since the majority of such stations have a daily broadcasting schedule of from 16 to 18 hours. What is more, the programming of a

single station operating under these optional time arrangements is infinitely simpler than the programming of a network in the absence of such provisions.

(c) *Sustaining Programs*: The sustaining programs furnished to the affiliated stations by NBC's network organization have a three-fold importance. First, they are of such quality that there is no dissent from the proposition that they serve the public interest. Second, their popularity is so great that they render a valuable service both to the network and to the affiliated stations by creating large audiences and consequent good will. Finally, the expense of supplying these programs goes far to explain the necessity for efficient network operations.

Musical sustaining programs include the Music Appreciation Hour, conducted by Walter Damrocht and concerts by the leading symphonies of the country. The NBC Symphony Orchestra has been created exclusively for radio, and its programs, under the leadership of such celebrated conductors as Arturo Toscanini and Leopold Stokowski, are broadcast as sustaining features from New York. For the last twelve years, NBC has broadcast the National Farm and Home Hour in cooperation with the United States Department of Agriculture at an annual cost of \$100,000. NBC also provides a continuous nationwide news service gathered from all parts of the world.

In addition, NBC makes its facilities available to religious groups of all denominations, to radio forums such as America's Town Hall Meeting of the Air, the Chicago Round Table and the National Radio Forum.

During 1940, NBC's aggregate schedule of network sustaining programs, involving over 35,000 broadcasts, required the expenditure of more than \$3,000,000 for talent and material alone. During the same period, NBC's other [fol. 245] expenses for network and key station operations, such as rent, sales, wirelines, engineering, staff, etc., aggregated over \$14,900,000.

(d) *Miscellaneous Contract Provisions*: There are several provisions customary in contracts of affiliation between NBC and its independent station affiliates which are in all respects reasonable.

One example is the provision expressly allowing any affiliated station to reject a network program offered under

the terms of the contract if such program is not in the public interest, convenience or necessity. This provision leaves the station entirely free to protect its legitimate interests as a licensee bound to operate in the public interest, convenience and necessity.

Network Operation of Key Stations.—It will be recalled that each nationwide network organization, as well as operating through affiliation contracts with independently operated standard broadcast stations, itself operates several key stations for network broadcasting. NBC, having two networks, operates two stations in each of the cities of Washington, New York, Chicago and San Francisco, each of these stations being a key station in one or the other of NBC's networks.

For example, NBC operates Station WJZ in New York as a key station of the Blue network and this station was acquired by NBC in 1931. Similarly, NBC acquired Station WEAJ in New York, which it now uses as a key station for the Red network, as early as 1926.

These key stations now operated by NBC are not many in number, but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it would be impossible to furnish the network services enjoyed by the radio audience today.

[fol. 246] **Revenue:** Networks must graduate their rates to advertisers upon the basis of the circulation that they can offer, that is to say, the probability that prospective customers will be listening to network programs. Network circulation is basically the sum of the circulations of each of the stations forming the network for a particular program, so that the network's revenues will vary directly with the availability of individual stations for a particular program. Augmenting this circulation, and consequently augmenting the network's revenues, is the additional circulation caused (as is shown by surveys of all types relied upon by the broadcasting trade) by the fact that listeners will be attracted to a particular network by reason of the goodwill that the network's circulation has enabled it to build up

over a period of years in the broadcasting of commercial and sustaining programs of high quality.

These factors are cumulative in nature. Any change in the provisions of affiliation contracts which would inhibit the network from offering its full circulation will endanger the entire network broadcasting structure as it exists today. Any hindrance to the ability of a network to offer its full circulation as based upon the number of affiliated stations available for a particular program, or the availability of a station in any key market, will result in an inevitable spiral of injury to the economic interests of network and affiliates. This injury increases in geometric progression, because any interference which blocks off affiliated stations necessarily lowers network revenues and this, in turn, requires a curtailment of program service which, in turn, further decreases the revenue to be received by the network and its affiliates.

[fol. 247]

IV

Injury Resulting From the Order

Impact of Order: The Order of the Commission, insofar as it purports to become effective on or before November 15, 1941, impacts network broadcasting at two vital points:

First: It requires an immediate revision of the contractual arrangements between individual standard broadcast stations and network organizations in a way which will make adequate nation-wide network broadcasting impossible; and

Second: It prohibits (a) ownership by a network organization of more than one station in any given locality, and (b) the ownership by a network organization of one of a few stations, or the most desirable station in a given locality.

Option Time: At present NBC is able to sell network time for commercial programs to national advertisers on the basis of an assured national circulation for specified hours of the day by giving its affiliated stations 28 days advance notice. NBC's ability to do this is basically dependent upon the time option provision in its contracts with affiliated stations, as hereinabove described, which enables NBC to sell network programs within the optional

time period and enables the affiliated station to use the balance of the day for such local programs as it sees fit.

As originally promulgated on May 2, 1941, paragraph 3.104 of the Commission's Order, as stated in the verified Complaint herein, prohibited the inclusion of any optional time provision in any contract of affiliation between a network organization and a standard broadcast station. As amended on October 11, 1941, said paragraph, as stated in said Complaint, prohibits the inclusion of an optional time provision in any contract of affiliation valid as against any other network organization, national or regional. Said paragraph, as amended, moreover, prohibits a station from [fol. 248] agreeing to clear its time of non-network programs for NBC upon less than 56 days notice. The same paragraph prohibits any option provision in any such contract which may "prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Said paragraph 3.104 divides the broadcast day into four segments (8 A. M. to 11 P. M.; 1 P. M. to 6 P. M.; 6 P. M. to 11 P. M.; 11 P. M. to 8 A. M.) and permits a station to agree to clear time of non-network commitments upon 56 days notice, so long as the time subject to call on this so-called "option" does not exceed a total of three hours within each of said four segments.

The effect of the amended paragraph 3.104, like that of the original, will be destructive of nationwide network broadcasting, to the detriment of the other radio services supported thereby. The vice of this amended paragraph is its failure to recognize that national network organizations must be able to clear time on affiliated stations in order to render a nation-wide service and that the identity or character of the organization which interferes with such clearance is immaterial. In addition to NBC there are at present two nation-wide networks, one operated by Columbia Broadcasting System, Inc. and the other by Mutual Broadcasting System, Inc., as well as a number of regional networks, and each of these networks, whether national or regional, will be able to block an NBC network program under the amended Order.

In operating under the Order, NBC would be forced to negotiate a sale of network time to a national advertiser, for example, on the Blue network upon an "if, as and

when" basis with respect to each of the 99 affiliated stations until all of the stations indicated that the particular time desired by the advertiser would be available.

National network advertising contracts are customarily entered into for a period of one year, subject to the right of the advertiser to cancel at the end of any thirteen-week period. Under the Commission's Order, before NBC could agree to enter into an advertising contract with an advertiser [fol. 249] for a commercial program, it would first have to communicate with each station to determine whether such station had available the particular period of time desired.

At the present time an advertiser using the Red network during the valuable evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled.

This problem is intensified in cases where the advertiser desires a line-up of 100 stations or more. The further fact must be considered that clearance must be accomplished for each of the many network programs broadcast. In order to save itself and its affiliated stations from damage, NBC would have to accomplish this feat a sufficient number of times annually to assure itself of a gross income of more than \$17,900,000, which amount is spent in maintaining NBC's network and key station broadcasting services inclusive of wirelines.

Optional time is as necessary for the practical operation of network broadcasting as traffic lights are for the practical flow of vehicular traffic. The Order is no more workable than an ordinance permitting each vehicle to operate the traffic lights to suit its own convenience, and the same chaos will result from its enforcement.

Elimination of network optional time on a firm basis under the Order of the Commission will cause irreparable

injury to NBC and its affiliated stations by making it financially and physically impossible to handle a sufficient volume of business to support the existing programs of the network organization. Abolition of such optional time will [fol. 250] inevitably lead to increased expenses to NBC and its affiliated stations as well as a reduction in network revenue and a consequent diminution in the quality of programs, thus setting in motion a vicious descending spiral. Such injury will result from the Commission's Order even though NBC and its affiliated stations take no action other than to amend their respective affiliation contracts so as to bring them into conformity with the Commission's Order.

The requirement that the station may agree to clear its time of non-network programs only upon 56 days notice will have the practical effect of an absolute prohibition against network optional time. It is a matter of common knowledge in the advertising business that national advertisers insist that a specific advertising program be placed before the public shortly after the contract is signed. This insistence is not peculiar to radio advertisers. For example, magazines having a national circulation have found it necessary to shorten the period between the deadline for advertising copy and publication.

The 28-day notice required in existing option time provisions was not determined theoretically, but is the result of an experienced balancing of the needs of the stations and needs of the advertisers, since the networks must satisfy the legitimate needs of both in order to exist. The 56-day period flagrantly disregards the practical necessities of the advertising business. National network organizations will have to satisfy the advertisers by clearing time on less than 56 days notice under penalty of losing to competitive advertising media the revenues which support the existing broadcasting services. As a result, NBC will have to negotiate for time on its affiliated stations on the basis of the 28-day notice period which has resulted from experience and in so doing will be unable to clear such time as against local commercial programs, local sustaining programs and other non-network programs, any one of which may defeat the scheduling of a network program.

The inevitable consequence will be the destruction of nation-wide network broadcasting to the irreparable injury of NBC.

[fol. 251] **Threatened License Revocations:** In effect the Order requires, and has been construed by the Chairman of the Commission as requiring, the amendment of contracts immediately upon the date that it purportedly becomes effective with respect to existing contracts, arrangements and understandings, inasmuch as the Commission in its Report (Exhibit D attached to the verified Complaint herein) has expressly stated that operation by a station under an affiliation contract containing prohibited provisions is not operation "in the public interest". Since the Commission in considering applications for renewal of the licenses of standard broadcast stations, concededly weighs evidence of each act of the station during the preceding licensing period deemed by it not to have been in the public interest, many of said stations will be impelled to discontinue operation under the prohibited contract provisions immediately upon the effective date of the Order. On June 2, 1941, moreover, Chairman Fly of the Commission, appearing officially on behalf of the majority of the Commission before the Committee on Interstate Commerce of the United States Senate, stated that the Commission would issue an order revoking the license of any station which retained an affiliation contract containing the prohibited provisions beyond the effective date of the Order.

Contract Cancellations: Between May 2, 1941 and the date hereof not less than 24 standard broadcast stations having effective contracts of affiliation with NBC containing one or more contract provisions described in paragraphs 28 through 35, inclusive, of the verified Complaint herein have served upon NBC notice of cancellation of their respective affiliation contracts and such action has been taken by such affiliated stations as a direct result of the Commission's Order, as stated in the respective notices of cancellation. In addition, not less than 24 other stations having effective contracts of affiliation with NBC containing such contract provisions have served notice that such stations do not intend to abide by the terms of such contracts unless such terms are conformed to the Order of the [fol. 252] Commission. Furthermore, NBC knows of a substantial number of additional stations which, unless the Order is complied with, intend to terminate such contracts upon the effective date of the Order. NBC has and will

continue to suffer irreparable injury as a result thereof, for reasons which are evident from the facts hereinabove stated.

Interference with New Affiliations: Between May 2, 1941 and the date hereof a number of independently owned and operated radio stations not affiliated with NBC have informed NBC of their desire to enter into an affiliation contract with NBC containing among other things many of the provisions prohibited by the Order of the Commission. As a result of its inability to enter into such affiliation contracts NBC has been directly injured. In a few isolated instances since May 2, 1941 new and relatively unimportant stations have been added to NBC's network, without contracts of the prohibited sort, on a temporary basis pending the ultimate disposition of the matter at issue.

In the normal course of NBC's network broadcasting business certain contracts of affiliation lapse or are terminated by mutual consent of the parties thereto for a variety of reasons. In such normal course of business, moreover, NBC enters from time to time into new contracts of affiliation with different independent radio stations. As a result, in so far as the exigencies of business permit, the aggregate number of affiliated stations does not decrease and may, and has, in the past, continued to increase despite the lapse or termination of contracts as aforesaid.

There is a direct relation between the net profits of NBC and those of its affiliated stations and the number of independent radio stations affiliated with NBC. Any factor which causes a diminution in the aggregate number of such affiliated stations, such as the Order of the Commission, damages NBC and each independent broadcast station affiliated with NBC.

Diminution of Income: A number of present NBC advertisers as well as prospective NBC advertisers to whom NBC has offered to renew existing contracts or has offered [fol. 253] new contracts for the broadcasting of commercial programs have refused to enter into said contracts upon the ground that NBC would, under the Order, be unable to assure said advertisers of the continued availability of stations presently affiliated with NBC throughout the term of said proposed advertising contracts.

Prohibition Against Network Ownership of Stations: Paragraph 3.106 of the Order of the Commission requires any network organization (a) to dispose of any standard broadcast station in excess of one where any two or more stations operated by said network cover substantially the same service area, and (b) to dispose of any standard broadcast station where such station is the only, or is the most desirable, station in a given locality. As a direct result of this paragraph of the Order, NBC would have to dispose of one of the two stations now operated by it in New York, Chicago, Washington and San Francisco. With respect to stations operated by NBC in Cleveland and Denver, the position of the Commission is expressed in the following quotation from page 68 of the Report accompanying said Order of the Commission: "In Cleveland, a most important radio market, the only broadcasting facilities are one clear-channel station (owned by NBC), two full-time regionals, and one part-time regional. Charlotte, N. C., has but two stations, one of which is a 50,000-watt station owned by CBS. It seems clear that no network ownership whatsoever should be allowed in either of these cities. In several other cities, such as Denver (NBC), Minneapolis (CBS), and Washington (NBC and CBS); the available facilities are somewhat more plentiful, but the disparity among the facilities raises serious doubts whether any network ownership should be permitted."

NBC's network operations are conducted over two groups of broadcast stations which are commonly known as the "Red" and "Blue" networks. NBC in 1926 began operation of both its Red network and the network that later became the Blue network. In broadcasting radio programs, the Red network and the Blue network generally, [fol. 254] operate separately, one program being broadcast from the stations on the Red network while a different program is simultaneously broadcast from the stations on the Blue network, although, in exceptional cases, the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope and there is a substantial overlap in the territories served by them as well as the territories served by the individual stations affiliated with the Red and Blue networks, respectively. NBC itself operates, in all, ten radio stations and these stations are divided between the Red and Blue net-

works in the following manner: (The stations are owned by NBC except as otherwise indicated.)

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL (Leased)
KPO	San Francisco, Cal.	KGO (Leased)
KOA (Leased)	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

NBC, like each of the other nationwide networks operated in the United States today, uses stations operated by the network organization itself in key markets as a nucleus for network operations, a practice of long standing. For example, NBC operates Station WJZ in New York as a key station of the Blue network, and this station was acquired by NBC from Radio Corporation of America in 1931. RCA became sole owner of said station on or about May 15, 1923, and had used the same as the key station for network broadcasting beginning as early as December, 1923. Similarly, NBC acquired Station WEAF in New York, which it now uses as a key station for the Red network, as early as 1926.

The key stations now operated by NBC are not many in number but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it will be impossible to furnish the network services enjoyed by the radio audience today.

The Order, in so far as it deals with the operation of two stations or the best station in a particular locality by a network organization, will compel NBC to dispose of stations without regard to this vital factor of network operations and will necessarily have a destructive effect upon NBC's business, all to its great damage and the damage of its affiliated stations. NBC will also be injured by paragraph 3,106 of the Order by loss of revenues and good will which will result from its inability to furnish, without greatly increased expense, facilities for broadcasting from the

point of origin outstanding commercial programs and sustaining programs of all types.

For example, the vast majority of the talks broadcast over NBC's networks by members of Congress and representatives of the executive branch of the government originate in one of NBC's two Washington stations.

NBC will also be damaged by this paragraph by loss of value incident to a forced sale and by destruction of value incident to NBC's inability to dispose of a leased station because of lack of provision for assignment in the lease.

V

Effect of order is contrary to public interest, convenience and necessity.

The facts hereinabove stated with respect to the basic requirements for the operation of a nation-wide system of network broadcasting which uses the same stations that are engaged in furnishing a local broadcasting service make the conclusion inescapable that the Order will bring about a situation in broadcasting in the United States which is so patently contrary to the public interest, convenience and necessity as to make its issuance an arbitrary and capricious act of the Commission.

[fol. 256] It has been made plain that broadcasting in the United States today is supported by the dollars received from national and local advertisers. Inasmuch as the advertising dollar is used to sustain this system of broadcasting, the advertiser is largely influential in determining the distribution or line-up of stations on commercial programs. General Foods for its Jello program may require a different line-up of stations from those that General Foods may require for its Maxwell House Coffee program, and the stations required by the Packard Motor Car Company differ radically from those demanded by Colgate-Palmolive-Peet. Each advertiser, within requirements set by the networks, attempts to custom-build his network to his own needs.

Minimum Requirements: Although the advertiser is thus in a position of significant influence in the choice of stations which will carry his program, his choice must today be made within the confines of certain restrictions which the networks through experience have found it advisable to

establish. One such restriction is a requirement that a network advertiser purchase not less than a fixed minimum number of stations. This requirement has been largely instrumental in insuring national coverage of radio programs.

An illustration of such minimum requirements is the fact that ten years ago an advertiser could purchase during the evening hours as few as ten stations on the NBC Red network for his program. Some years later this minimum requirement was increased to 23 stations and today, during the important evening hours, it is necessary for an advertiser to buy a minimum of 50 stations on NBC's Red network.

Effect of Minimum Requirements: The establishment of minimum station requirements for network broadcasting has been adopted at least in part by all of the national networks operating today and these requirements have served the public interest in four respects:

[fol. 257] *First*, they have enabled the networks to give the United States a truly nation-wide radio service.

Second, they have enabled more stations better to serve more people in their communities with outstanding radio entertainment.

Third, they have enabled the networks to give their respective affiliated stations, particularly the smaller ones, more hours of outstanding programs and more dollars of commercial revenue.

Fourth, they have produced increased revenue for the networks, not only for profit but for investment in more and better sustaining and public service programs and for research and development of new services (such as television) on which NBC has already spent several millions of dollars.

In addition to the establishment of these minimum requirements, the network, with its sales organization, acts as network sales agent for each of its affiliated stations. In conjunction with each and every commercial account the network sales organization does everything in its power to convince the advertiser that it is profitable for him to employ a maximum number of stations in his line-up in excess of the network's minimum requirements.

The Order of the Commission makes it practically impossible for NBC and the other networks to continue to

maintain their respective minimum station requirements, and thus damages both the public and the stations. In place of the existing arrangements, the Order will substitute a system favoring the large stations and the large advertisers, for it is fallacious to assume that the stations and the networks can operate as they have when the Order of the Commission becomes effective.

Advertising Super-Network: The large national advertiser is, as a matter of experience, thoroughly familiar with the coverage and popularity of practically every station in the United States. Such advertiser desires to purchase [fol. 258] the best network—that is to say, the network that will give him the greatest audience at the lowest cost—and he will be enabled by the Order to put together a network line-up heretofore unavailable by selecting the best stations, and only the best stations, from all networks.

Thus, an advertiser can approach NBC under the Order and insist upon buying a network which consists not of NBC stations alone, but one built up of the best stations of the NBC Red, the NBC Blue, the Columbia and the Mutual networks. If NBC should decline to act as sales agent for the deal, there is nothing to prevent the advertiser or his agency from negotiating directly with the stations, contracting for telephone wirelines and establishing his own network for his program.

Attached hereto as Exhibit I, and by reference made a part hereof as fully as if set forth herein, is a map of a 64-station network (hereinafter referred to as the "No. 1 Advertiser Network") built up in the manner described above, which network will be available to national advertisers under the Order of the Commission. This network does not show a theoretical line-up of stations, but represents the stations selected by a well-known advertising expert as typifying what he would like to purchase for his clients when enabled to do so under the Commission's Order.

This No. 1 Advertiser Network of 64 stations affords excellent coverage of 92.4% of the radio families in the United States, and good coverage of all of the remainder of such families.

Upon the assumption that the No. 1 Advertiser Network is used by an advertiser from 9 to 9:30 o'clock on a Monday evening, Exhibit II hereto attached, and included herein by reference as fully as if set forth herein, illus-

trates the network which it will be necessary for a second advertiser to buy even to approximate the coverage achieved by his competitor who bought time on network No. 1. Such a second advertiser would be required to include 160 stations and would obtain excellent coverage of only 76.4% of the radio families in the United States and good coverage of an additional 7.7% of such families.

[fol. 259] Exhibit III attached hereto, and by reference made a part hereof as fully as if set forth herein, is a map showing the stations available to any third advertiser who might desire to go on the air at the same time Monday night as the advertisers who bought time on networks No. 1 and No. 2. Regardless of the number of stations this third advertiser might desire to buy or even the amount of money that he might be willing to spend, it would be impossible for him to acquire any network line-up which would give him a national coverage equal to that of his competitors. The best remaining network line-up possible would necessitate the use of 191 stations and would provide excellent coverage of a mere 65% of the radio families in the United States and good coverage of an additional 2.2% of such families.

The Commission on October 11, 1941 amended paragraph 3.102 of the Order so as to permit a provision in affiliation contracts giving the station "first call" on the programs of a particular network organization. This was intended, as is shown by the Commission's Supplemental Report (Exhibit E to the verified Complaint herein) to obviate objections to the original Order along the lines indicated above. It does nothing of the sort. As is evident from the foregoing facts, the growth of advertisers' super-networks will be due not to the stations' inability to obtain network programs, but to the networks' inability to obtain first call on the time of their affiliated stations and the amendment completely fails to remedy this defect in the Order.

Cost of Coverage: That the above-mentioned facts are by no means hypothetical and that a situation of the type above described will result from the Order of the Commission is clearly shown by the fact that the above-described No. 1 Advertiser Network, despite its unprecedented coverage, will cost the advertiser less than the present NBC Red Network or the present Columbia network or the No. 2 or No. 3 Advertiser Network. No. 2 Advertiser Network, with less coverage, moreover, not only will cost more than

[fol. 260] the present NBC Red or Columbia networks, but it will cost more than the super-network No. 1.

Effect on Public Interest: Truly national coverage under the Commission's Order will become the opportunity of a relatively few major advertisers, and the bulk of the advertising revenue of the United States will go to a relatively few of the country's major stations. There will be only one rather than four national radio networks worthy of the name and this result is obviously contrary to the public interest, convenience and necessity.

VII

Summary

The nationwide network broadcasting services enjoyed by the United States today are the fruit of fifteen years of hard work and far-sighted development by everybody connected with the broadcasting industry. Without governmental subsidies, in the face of a shattering depression and despite an unusually high rate of obsolescence, the broadcasters risked their money and used their brains with the result that this nation has a network broadcasting service which is unequalled in any other country of the world and which represents a national asset of incalculable value in a time of emergency.

There is scarcely an industry in this country today which can point to a record as clean as that of the broadcasting industry. Its organization and business practices have never been kept secret and the very contracts to which the Commission now objects have been on file with the Commission ever since they were entered into. Year after year the operation of the NBC networks has been certified as being in the public interest by the issuance and renewal of hundreds of station licenses by two Commissions.

Now, on the basis of armchair theories, over the vigorous dissent of two of its members, a majority of the present Commission would destroy the structure supporting American radio. There was no sensational discovery in the Commission's three-year study of network broadcasting to justify this wrecking operation. The Commission was only able to criticize isolated incidents so few in number as to add to, rather than to detract from, the character of the broadcasters.

The Commission's ban upon firm option time represents a refusal to take account of the practical necessities of network broadcasting even as recognized by the Commission itself. The sum and substance of NBC's position as to the effect of the Order forbidding the networks to obtain firm options on station time is succinctly expressed in the words of the Commission majority, as contained in the Report of May 2, 1942:

"Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the important stations are subject to withdrawal upon order of a dominant network."

Withdrawal or refusal, upon order of a "dominant" network, upon order of any network or upon order of a local sponsor, as pointed out above, the vital issue is that time must be cleared on not more than 28 days notice if network broadcasting is to be supported by the advertisers. The effect of the loss of advertising revenues upon network broadcasting services will be direct and disastrous.

The Commission also proposes to compel NBC to dispose of the key stations which are vital to its network operations and which are renowned for the quality of the service they furnish. The quality of the service rendered by these stations has largely been due to their operation by NBC, and their forced disposal will not only damage NBC but will also work to the prejudice of the interests of the listening public.

The Commission's pious expressions of horror at the "monopolistic" tendencies of four vigorously competing national networks, rendering a valuable and laudable service, raise serious questions as to its understanding of the whole [fol. 262] problem of broadcasting when placed beside the plain fact that its Order will create a complete monopoly by a single super-network capable of stifling all competition.

It is plain from the facts hereinabove stated that NBC has suffered and will continue to suffer irreparable injury as the direct result of the Commission's Order unless enforcement of the same be restrained. On the other hand, the Commission has plainly conceded that continuance of the *status quo* pending a final court determination on the issues raised by NBC in this proceeding will not be inimical to the public interest.

The Commission's Order was first issued on May 2, 1941 and in so far as it deals with existing contracts and station ownership, the effective date thereof has been postponed by the Commission itself for a period of over six months. If the public interest has not been injured by such temporizing by the Commission, it can scarcely be contended that any vital interest will suffer as a result of a stay pending a hearing in this proceeding.

Furthermore, when Chairman Fly of the Commission appeared on behalf of the majority of the Commission before the Committee on Interstate Commerce of the United States Senate on June 2, 3 and 4, 1941, Chairman Fly several times stated in effect that the Commission would be willing to have broadcast stations continue operations under existing conditions pending a court determination of the power of the Commission. For example, on June 3, 1941 Senator Clark of Idaho asked Chairman Fly:

"If the broadcasting chains that feel themselves aggrieved by your regulations should decide to go into court and test out the question of jurisdiction, or whatever other question might be permissible, I take it from your statement that as long as the court proceeding was undetermined you would not press the matter, even though an injunction or something of the kind might not be obtained from the court. In other words, you would not undertake to force the doing [fols. 263-266] of something that could not reasonably be done within that limit [the original 90 day postponement of the effective date] in the interest of the industry. Do I make myself clear?"

In answer to this question Mr. Fly stated:

"Yes; I think you are clear",

and then went on to a different matter.

Niles Trammell.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal)

[fol. 267] IN UNITED STATES DISTRICT COURT FOR THE SOUTH-
ERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN J. GILLIN, JR.

STATE OF NEW YORK,

County of New York,

Southern District of New York, ss:

John J. Gillin, Jr., being first duly sworn, deposes and says:

1. I am the General Manager of station WOW, owned by Woodmen of the World Life Insurance Society, one of the Plaintiffs herein. I have read the verified complaint herein and I am familiar with the facts therein stated and know the same to be true except as to matters stated on information and belief, and as to such matters, I believe the same to be true. This affidavit is made in support of the application of the Plaintiffs in this action for a temporary injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. The Woodmen of the World Life Insurance Society is a corporation organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, in said State and licensed to transact its [fol. 268] corporate business in the States of Nebraska and New York. The Woodmen of the World Life Insurance Society owns and operates under a license from the Federal Communications Commission, and has owned and continuously operated since April 2, 1923, a standard broadcast station known as WOW, which station is located in the City of Omaha, Nebraska. Successive renewals of the license to operate station WOW were issued to the Society by the Federal Radio Commission after its creation in 1927, and by the Federal Communications Commission since its creation in 1934, upon findings, as required by statute, that the public interest, convenience or necessity would be served thereby. The Society is now, and at all times since 1923 has been, duly qualified, legally, financially, technically and by experience and in all other respects, to operate said station WOW.

3. Said station WOW represents an investment by the Society of assets, other than good will, having a present

value in excess of \$175,000, and said station WOW is a going concern which during its 18 years of operation by the Society has created values for the Society of over \$500,000 in good will.

4. The affiant has been associated with station WOW as General Manager since 1932, and is familiar with the operations of station WOW and radio broadcasting business in general, and with the radio broadcasting and radio network broadcasting business of National Broadcasting Company, one of the Plaintiffs herein and its relationship with station WOW in particular.

5. In 1927, the Society entered into a contract with the National Broadcasting Company for the broadcasting in the area served by station WOW of the programs sent out by the National Broadcasting Company over what is known as the "Red" network of said National Broadcasting Company. From time to time, other contracts of affiliation were entered into, and station WOW has continuously operated as an affiliate of the National Broadcasting Company since that date, the present contract under which such operations are conducted being dated December 2, 1936 and running for a period of five years thereafter. Under the aforesaid contract station WOW receives, and broadcasts to its audience in the area served by the station both sustaining and commercial programs transmitted by the National Broadcasting Company. In addition station WOW broadcasts programs which it originates itself.

6. Approximately half of the broadcasts of station WOW are network programs of the National Broadcasting Company transmitted to station WOW by wire. The revenue derived by station WOW from the broadcasting of network programs of NBC has consistently amounted for several years to sums in excess of \$100,000 per annum.

7. During the 18 years of the operation of WOW the station has by the superiority of the programs broadcast by it acquired great popularity with a vast listening audience covering several states, reaching millions of listeners in the territory adjacent to the City of Omaha, Nebraska. The size of the audience and the popularity of the station is due largely to the high quality of the sustaining and commercial programs received by station WOW from the

National Broadcasting Company transmitted through its network and broadcast by station WOW.

Without the aid of the organization and facilities of the National Broadcasting Company in furnishing high quality sustaining and commercial programs, including special events of national importance, it would be impossible for station WOW to give its listening audience the same high quality program material without great additional cost in personnel, equipment and facilities. The additional cost of providing programs of the same high quality and standard as those furnished by the National Broadcasting Company would materially impair the revenue producing ability of station WOW, and if the same high quality of the program material is not maintained, the station's popularity with its present radio audience would be materially reduced, with a resulting reduction in the value of the station as an advertising medium.

[fol. 270] 8. The Federal Communications Commission (herein referred to as the "Commission") is an administrative Commission or tribunal created by the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064; Code of Laws of United States, Title 47). On May 2, 1941, the Commission issued its original Order in Docket No. 5060 (Exhibit D to the verified complaint herein). On October 11, 1941, the Commission amended its Order in Docket No. 5060, a copy of such amendment being Exhibit E to the verified complaint herein. Said Order, as amended (hereinafter sometimes called "the Order"), is summarized in the verified complaint and the effective date of the Order is stated therein.

9. The Order of the Commission requires in effect a revision of the existing contract between the National Broadcasting Company and the Woodmen of the World Life Insurance Society, under penalty of losing its license to operate said station WOW. Affiant is informed and verily believes that the National Broadcasting Company cannot continue to supply the same high quality programs and profitably operate network broadcasting under the rules promulgated in the Order and continue to supply the same high quality of programs.

The Order places the onus on station WOW of breaching the existing contract by either failure to broadcast the

network programs offered under the option time provisions of the contract or closing down the station, in violation of the express provisions of the existing contract. As a result the Woodmen of the World Life Insurance Society is in imminent danger of being subjected to a suit for damages for breach of the existing contract.

10. The revenue of station WOW, as well as of radio stations generally, is derived entirely from the sale of radio time to advertisers. The rates for radio time on station WOW, as well as on all other radio stations, are based upon the circulation that they can offer to the advertiser, that is to say on the probability that prospective customers [fol. 271] will be listening to the programs being broadcast by the station.

The probability that a large number of prospective customers will be listening is increased if the programs broadcast by the station are of constant high quality and standard. Affiant believes that without the benefit of its contract of network affiliation with National Broadcasting Company station WOW could not broadcast programs of the high quality and diversification equal to those presently broadcast by it without incurring considerably increased expenses.

11. Affiant is informed and verily believes that the owners and operators of station WOW will suffer irreparable injury unless enforcement of the Order be restrained, in that:

A. The Society will be forced to breach the existing contract with the National Broadcasting Company with resulting danger of a suit for damages by National Broadcasting Company.

B. The Society will lose revenues from the broadcasting of commercial programs under said contract.

C. The station will be deprived of good will built up by its affiliation with the National Broadcasting Company over a period of 14 years.

John J. Gillin, Jr.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public, Queens Co. No. 262, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

[fol. 272] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF EDWARD A. HANOVER

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

EDWARD A. HANOVER, being duly sworn, deposes and says:

1. I am a Vice-President of Stromberg Carlson Telephone Manufacturing Company (hereinafter called "Stromberg Carlson"), one of the Plaintiffs herein. I am familiar with the radio broadcasting business in general and with Stromberg Carlson's radio broadcasting business in particular, and have been associated with Stromberg Carlson in the broadcasting business since its commencement of that business in 1927. I have read the verified Complaint herein and I am familiar with the facts therein stated. This affidavit is made in support of the application of the Plaintiffs herein [fol. 273] for a temporary or interlocutory injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. Stromberg Carlson is the owner and operator of a 50,000 watt standard broadcast station located at Rochester, New York, and known as WHAM, which it has been licensed to operate since 1927. Stromberg Carlson acquired Station WHAM by purchase from the prior owner thereof, and Stromberg Carlson has been granted successive renewals of its license to operate said station both by the Federal Radio Commission since its creation in 1927 and by the Federal Communications Commission since its creation in 1934, upon findings as required by statute that the public interest, convenience and necessity would be served thereby.

3. When acquired in 1927 by Stromberg Carlson WHAM had a power of 100 watts. The power of the station was thereafter increased from time to time at considerable expense to Stromberg Carlson with the approval of the Federal regulatory authority having jurisdiction, in successive steps to the present power of 50,000 watts, which is the

- maximum permitted by the present rules of the Federal Communications Commission.

4. Station WHAM has been affiliated with National Broadcasting Company, Inc., one of the Plaintiffs herein (hereinafter called NBC), since 1927. During this period of time it has been affiliated with the Blue network of NBC. The terms of such affiliation are set forth in the present affiliation contract covering station WHAM between NBC and Stromberg Carlson, dated October 6, 1936, which originally ran for a period of 5 years but has subsequently been extended, on or about June 26, 1939, for an additional 5-year period so that its expiration date is now October 15, 1946. The present contract provides in general that:

(a) NBC will pay for special wirelines connecting the originating point of the program to WHAM.

(b) WHAM grants NBC an option to sell certain specified periods of the station's time, exercisable on 28 days [fol. 274] notice, for the broadcasting of commercial programs.

(c) NBC will supply WHAM with a full schedule of sustaining programs, without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

(d) As compensation for the network services rendered by NBC including sustaining programs, the assumption of wireline charges and services in selling the station's time, NBC retains a certain portion, and pays the station the balance, of the proceeds which it receives from advertisers for the sale of WHAM's time.

5. Station WHAM has a gross income from sales of its time to NBC and to local and other advertisers of approximately \$500,000 per annum. It owns its transmitter located outside Rochester, New York; leases studios located in Rochester; and employs approximately 60 persons.

6. In addition to broadcasting network programs received from NBC, station WHAM is the originating point for certain sustaining programs which are transmitted by NBC over its Blue network. Among such sustaining programs which originate in Rochester and are transmitted to

the Blue network by WHAM are those of the Rochester Civic Music Association which has approximately 8,000 individual subscribers. The Rochester Civic Music Association supports the Rochester Philharmonic Orchestra conducted by José Iturbi and the Rochester Civic Orchestra. In addition WHAM originates programs from the Eastman School of Music, which is part of the University of Rochester. Through WHAM's affiliation with NBC the musical programs from these orchestras have been broadcast regularly on a nationwide basis for approximately ten years. Not only has such nationwide broadcasting been made possible by WHAM's affiliation with NBC (to the resulting benefit of the nation as a whole) but in addition [fol. 275] such affiliation has provided a national network outlet for one of the foremost musical centers in the United States.

7. As stated in paragraph 4 above, the present contract between NBC and Stromberg Carlson covering Station WHAM grants to NBC a firm option to sell certain specified periods of the station's time on 28 days notice. The above mentioned Order prohibits the inclusion of such an optional time provision in any contract between a network organization and a standard broadcast station. Because of said contract with WHAM containing provisions for such optional time, and similar contracts with other stations, NBC is in a position to sell time to advertisers on a national network, *as such*. If an option exercisable as against another network organization or exercisable on less than 56 days notice is prohibited it will be practically impossible to sell time to advertisers on a network basis, *as such*. As a result WHAM will receive less revenue under its affiliation contract with NBC. For the year 1940 the income of Station WHAM was derived approximately one-half from the sale of network time by NBC.

8. In 1941 there has been a substantial increase both in the amount of network time sold to NBC and the amount of time sold to local and other advertisers. Even with an increase in the sales to NBC, Station WHAM has been fully able to serve its local community in local advertising and in the broadcasting of all events of local interest. Sale of time to NBC and optional provisions of the contract have been equally beneficial to both the national and the local service of WHAM.

9. The receipt of high quality network programs from NBC has contributed substantially to the growth of WHAM's radio audience and this is reflected in the desirability of WHAM as an advertising medium. Stromberg Carlson estimates that the price at which it would be able to sell time to advertisers without network affiliation would be approximately one-half of the price which it currently receives.

[fol. 276] 10. The present license of Station WHAM expires on February 1, 1942. The Order does not by its terms require the immediate modification of existing contracts. The Order simply provides that a license will not be granted if contracts are in force which contain provisions such as are set forth in the existing contracts between NBC and Stromberg Carlson. However, the Chairman of the Commission has stated at hearings before the Senate Committee on Interstate Commerce that operation of a station under an affiliation contract containing provisions which are prohibited by the Order is not an operation which is in the public interest. Furthermore the Chairman of the Commission also stated at such hearings that the Commission will issue an order revoking the license of any station which retains an affiliation contract containing provisions which are forbidden by the Order.

11. Cancellation of the affiliation contract with NBC will disturb an association which has existed for fourteen years and will inflict irreparable loss upon Stromberg Carlson. Furthermore, cancellation of the contract without the consent of NBC may result in suit by NBC against Stromberg Carlson for breach of contract. The Order places the burden on Stromberg Carlson of complying with the Order, which will cause irreparable damage to Stromberg Carlson through loss of revenue (and which may in addition subject it to damages for breach of contract) or, in the alternative, of not complying with the Order which may result in the loss of its license for Station WHAM.

Edward A. Hanover.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission expires March 30, 1943. (Seal.)

[fols. 277-280] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. Duly acknowledged. — —,
Notary Public.

[fol. 281] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL
BROADCASTING SYSTEM, INC., in Opposition to Motion for
Preliminary Injunction.

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and
says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title [fol. 282] of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to, its competitive

aspects, including present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Intersate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this [fol. 283] Court in support of the motions of plaintiffs National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Ramberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
United Broadcasting Co.	6	WICC	Bridgeport, Conn.
		WHK	Cleveland, O.
		WCLE	Cleveland, O.
Cincinnati Times-Star Co.	6	WHKC	Columbus, O.
Western Ontario Broadcasting Co., Ltd.	6	WKRC	Cincinnati, O.
		CKLW	Windsor, Canada (in the Detroit area)

* Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by the same interests.

[fol. 284] Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co.	WIP	Philadelphia, Pa.
WCAE, Inc.	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc.	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of rep-

representatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

[fol. 285]

III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 190 broadcast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in

Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, [fol. 286] the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets, or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.*

Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of \$1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in

[fol. 287] mileage and costs¹ and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

4. *Mutual's network program service--general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, additional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors, Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by mutual but, in some instances, [fol. 288] through sales organizations maintained by its

¹ According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of \$3,600,000" for two national networks. According to Paley's affidavit, page 9, the cost is "over \$2,000,000 a year." Both these figures apparently include the cost of special, local, occasional or temporary lines in addition to those used regularly as part of the network systems.

shareholders or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors; but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said competitors, and differs only in that (1) because of its smaller volume of commercial network programs Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders [fol. 289] and affiliates, principally those at New York, Chicago and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual

cost of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.² In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same purposes and perform substantially the same functions as the so-called key stations of its competitors.³ The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program, instead of having the function of providing sustaining programs appropriated entirely by the network organizations,⁴ (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of [fol. 290] being retained by the network corporation,⁵ (3)

² According to Trammell's affidavit, page 15, National's *two* national networks, the Red and the Blue, "required the expenditure of more than \$3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of \$5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds \$1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

³ It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

⁴ Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

⁵ As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

the public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. *Ownership of stations, studio facilities, etc.* Unlike its said competitors, Mutual, as such, does not own or operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and perform substantially the same functions as the so-called key stations of National and Columbia,⁶ so far as they are either necessary or desirable for successful network operation. The stations which serve such purposes for Mutual have elaborate studios in buildings specially built

⁶ It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i.e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e.g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

or adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and, in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

"Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate, which in the normal case is either large enough to include, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total [fol. 292] volume of business, the actual total sum paid to its affiliates is, in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a network exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provi-

sions contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and, at the time the contracts were entered into, Mutual advised the Commission of the fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their original form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

[fol. 293] "2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series), to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the

case of a commercial program or a series of commercial programs:

“(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

“(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

“If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable [fol. 294] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

“(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer

said program or programs to any other station in said city; and

“(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)”

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the motions of plaintiffs now under consideration and to the stipulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission

on the subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) transcript of record, and in Exhibits Nos. 368 to 43. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become [fol. 296] greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

"No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond"

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supplement [fol. 297] to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent and purpose of crippling Mutual as a competitor by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the

¹ Thereafter, after sale by Columbia of a station (WKRC), theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed: No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

[fol. 298]

V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation 3.103. These contract provisions, generally described, consist in

a). provisions by which the affiliate agrees not to broadcast the programs of any other network organization;⁸

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days'

⁸ Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

notice, either on all its hours of operation,⁹ or on its more desirable hours in the morning, afternoon, and evening periods;¹⁰ and

[fol. 299] c) provisions by which the term of such contracts is fixed at a period of 5 years or more.¹¹

In addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in two communities served by less than four full-time broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the discussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,¹² many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours

⁹ Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 daytime hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on all the station's time until the maximum is reached.

¹⁰ Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon; from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

¹¹ This is true of nearly all contracts between National and Columbia and their respective affiliates.

¹² In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

of operation (e. g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, [fol. 300] some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks.

In actual practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.¹³ In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served [fol. 301] by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a portion of the public as is possible; consistently with the amount of money available to them for radio advertising and the probable return therefrom. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized, and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective

¹³ See footnote 10 above.

return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations [fol. 302] in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period. It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day, and at the same hour with the same, or an improved, character of program. A vital and usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used

in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the [fol. 303] same program can be transmitted for simultaneous broadcasting to the audiences of many stations, and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their cooperation in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and [fol. 304] importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by

the public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent; (4) the network commercial programs of one or more competitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting

of the advertisers' programs at the desired and scheduled time in such markets.¹⁴ Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their ap-[fol. 306] peal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities

¹⁴ As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

of competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting*, *Variety* and *Radio Daily*, which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization; and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to make, representations to advertising agencies and advertisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the at-

tendant inconveniences, resorts to transcriptions and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.¹⁵

[fol. 308] d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National or Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition

¹⁵ In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.
Houston, Texas
Memphis, Tenn.
Birmingham, Ala.
Omaha, Neb.
Richmond, Va.
Jacksonville, Fla.
Des Moines, Iowa
Salt Lake City, Utah.
Bridgeport, Conn.
Tulsa, Okla.
Spokane, Wash.
Charlotte, N. C.

Harrisburg, Pa.
Binghamton, N. Y.
Evansville, Ind.
Manchester, N. H.
Augusta, Ga.
Cedar Rapids, Iowa
Lancaster, Pa.
Corpus Christi, Texas
York, Pa.
Columbia, S. C.
Bangor, Me.
Weslaco, Texas
Shenandoah, Iowa

In all but 3 instances, the stations in question are affiliated with National.

with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of having to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same stations at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above [fol. 309] described, National, in order to induce advertisers to use its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever

since the Commission's Order of May 2, 1941, have been; making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

[fol. 310] 9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a) *The Ballantine Program.* In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of 52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter broadcast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14

stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red
WCSH	Worcester	Red
WTIC	Hartford	Red
WICC	Bridgeport	Blue
WMFF	Plattsburg	Blue
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue
WKBO	Harrisburg	Red and Blue
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue
WXYZ	Detroit	Blue Network

[fol. 311] It was necessary for the 14 stations to accept the Ballantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Ballantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min-

utes instead of 30 minutes, thus further reducing their compensation.¹⁶

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual [fol. 312] was \$27,711.75 for the five weeks involved, plus an additional \$17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon should

¹⁶ Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Bulantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix H. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the [fol. 313] advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program*. In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of *Time* Magazine, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the representatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order

from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8:00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. [fol. 314] As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly announced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recording on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the program on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first

broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. National thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being, broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

[fol. 316] (i) *General.* The foregoing, while including the principal examples of network commercial programs known by affiant to have been lost by Mutual because of National

and Columbia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

10. *Apprehended loss of further business by Mutual. (a) The Coca-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arcy Advertising Agency, acting in behalf of its client, Coca-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known [fol. 317] to affiant, it is the largest piece of business advertising a single product by any network. It represents over \$2,250,000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made redoubled efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coca-Cola order,

National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nationwide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coca-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coca-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to National's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes [fol. 318] and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

(b) *The Bayuk Cigar Company Program.* The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations). The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate [fol. 319] stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General.* The loss of the Cocoa-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the point of view of both revenue and prestige. Mutual has, at present, a total of 14¼ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or

any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the 14 $\frac{1}{4}$ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option-time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss [fol. 320] of prestige such as Mutual has already suffered because of the restrictive contract provisions, and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates directly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is

able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

[fol. 321]

VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more

full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station [fol. 322] affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs; (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has already been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, [fol. 323] and regardless of the number of stations render-

ing adequate service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practicable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining

programs, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.¹⁷

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

[fol. 325] Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network* programs (local or na-

¹⁷ In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

tional spot) at various hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.¹⁸

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the [fol. 326] restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served

¹⁸ Mr. Trammell's statement in his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the rate of only a very few per year. In all but a tiny fraction [fol. 327] of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser.

(in the absence of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requirement a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a station [fol. 328] from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-network."* Of the various chimaeric alarms which have been conjured up to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased proportionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets,

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engi-

neering, promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsiderable [fol. 329] option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Network comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network, to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once

having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other [fol. 330] networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing, *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the station so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any event and will not be particularly marked or substantial during the next two years.¹⁹

11. *General.* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the

¹⁹ In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, [fol. 331] until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. Edward H. Grohs, Notary Public. N. Y. County, N. Y. Co. Clk's. No. 507, Reg. No. 3972. Term expires March 30, 1943. (Seal.)

APPENDIX A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

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Stations	Cities	Population	Primary Affiliations	Power	Frequency (kilocycles)	Hours of Operation
WOR	New York, N. Y.	11,690,520		Day	710	Unlimited
WGN	Chicago, Ill.	4,499,126		50,000	720	"
WIP	Philadelphia, Pa.	2,808,644		50,000	610	"
CKLW	Detroit			5,000		
	Windsor, Mich.	2,205,867		5,000	800	"
WLOL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,330	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	1,420	"
WCLE	Cleveland, Ohio	1,214,943		500	610	Daytime
WOL	Washington, D. C.	907,816		1,000	1,260	Unlimited
WFBR	Baltimore, Md.	1,046,692		5,000	1,300	"
KWK	St. Louis, Mo.	1,367,977		5,000	1,380	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	1,250	"
WGR	Buffalo-Niagara, N. Y.	857,719		1,000	550	"
WKRC	Cincinnati, Ohio	789,309		5,000	550	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,590	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	880	Daytime
WHBC	Indianapolis, Ind.	455,357		5,000	1,070	Unlimited
KFEL	Denver, Colo.	384,372		5,000	950	"
WSAY	Rochester, N. Y.	411,970		250	1,240	"
WHKC	Columbus, Ohio	365,796		500	640	L-KFI
WAGE	Syracuse, N. Y.	258,352		1,000	620	Unlimited
WHFF	Rock Island-Davenport-Moline, Ill.-Ia.					
KFOR	Lincoln, Neb.	174,995		5,000	1,270	"
		88,191		250	1,240	"

APPENDIX A—Continued
Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

[fol. 33]

Stations	Cities	Population	Primary Affiliations	Power	Day	Night	Frequency (kilocycles)	Hours of Operation
COLONIAL STATIONS								
WAAB	Boston, Mass.	2,350,544		1,000	1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N. B. C. Blue	5,000	5,000	5,000*	790	
WFCL	Pawtucket, R. I.							
	Providence, R. I.	711,500		1,000	1,000	1,000	1,420	
WTHT	Hartford, Conn.							
	New Britain, Conn.	502,193		250	250	250	1,230	
WELI	New Haven, Conn.	308,228		1,000	500	500	960	
WSPR	Holyoke-Springfield, Mass.	394,623		500	500	500	1,270	
WICC	Bridgeport, Conn.	216,621	N. B. C. Blue	1,000	500	500	600	
WATR	Waterbury, Conn.	144,822		1,000*	1,000*	1,000*	1,320	
WNBH	Fall River-New Bedford, Mass.	272,648		250	250	250	1,340	
WSAR	Fall River-New Bedford, Mass.	272,648		1,000	1,000	1,000	1,480	
WLJH	Haverhill-Lowell-Lawrence, Mass.	334,969		250	250	250	1,400	
WPRK	Pittsfield, Mass.	49,684		250	250	250	1,340	
WCOU	Lewiston, Me.	38,598		250	250	250	1,240	
WNLC	New London, Conn.	30,456		250	250	250	1,490	
WSYB	Rutland, Vt.	17,082		1,000*	1,000*	1,000*	1,380*	
WHAJ	Greenfield, Mass.	15,672		250	250	250	1,240	
WLNH	Laconia, N. H.	13,484		250	250	250	1,340	

DON LEE

KHJ	Los Angeles, Cal.	2,904,596	5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,325	5,000	5,000	610	"
KOL	Seattle, Wash.	452,639	5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406	5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368	1,000	1,000	1,360	"
KGA	S.okane, Wash.	141,370	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018	5,000	5,000	1,360	"
KTKC	Visalia-Fresno, Cal.	97,504	5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252	1,000	1,000	1,600	"
KFXM	San Bernardino, Cal.	43,646	250	250	1,240	S-KPPC
KDB	Santa Barbara, Cal.	34,958	250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221	1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921	250	250	1,490	"
KRKO	Eugene, Wash.	30,224	250	100	1,400	"
KORE	Eugene, Ore.	20,838	250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497	100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846	250	250	1,340	"
KIEM	Eureka, Cal.	17,055	1,000	500	1,480	"
KGy	Olympia, Wash.	13,254	100	100	1,240	"
KMYC	Marysville, Cal.	6,646	100	100	1,450	"
KYOS	Merced, Cal.	10,135	250	100	1,080	Daytime
KXO	El Centro, Cal.	10,017	100	100	1,490	Unlimited
KHSL	Chico, Cal.	9,287	1,000	1,000*	1,290	"
KVEC	San Luis Obispo, Cal.	8,881	250	250	1,230	"

N.B.C. Blue

APPENDIX A—Continued
Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Station	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KDON	Monterey, Cal.	10,084		250*	250*	1,240	Unlimited
KVCV	Redding, Cal.	8,109		250	250	1,230	"
KVOO	Marshfield, Ore.	5,259		250	250	1,230	"
KWLK	Longview, Wash.	12,385		250	250	1,400	"
KRNR	Roseburg, Ore.	4,924		250	250*	1,400	"
KELA	Centralia, Wash.	7,414		1,000	1,000	1,470	"
KWIL	Albany, Ore.	5,654		250	250	1,240	"
KAST	Astoria, Ore.	40,389		250	250	1,230	"
Northeast Group							
WJW	Akron, Ohio	349,705		250	250	1,240	"
WABY	Albany, N. Y.	431,575		250	250	1,400	"
WILM	Wilmington, Del.	188,974		250	250	1,450	"
WAHM	Wilkes-Barre-Scranton, Pa.	629,581		250	250	1,400	"
WHBC	Canton, Ohio	200,352		250	250	1,230	"
WKHO	Harrisburg, Pa.	173,367		250	250	1,230	"
WNHF	Binghamton, N. Y.	145,154	N.B.C. Red, Blue C.B.S.	250	250	1,230	"
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		5,000*	5,000*	1,290*	"
WGAL	Lancaster, Pa.	132,027		100	100	1,240	"
WORK	York, Pa.	92,627		250	250	1,490	"
WENY	Elmira, N. Y.	45,106		1,000	1,000	1,350	"
WEST	Steubenville, Ohio	37,651		250	250	1,230	"
WLBZ	Rangor, Me.	29,822		250	250	1,340	"
WEIN	Fitchburg, Mass.	41,824		250	250	1,400	"
WPAY	Portsmouth, Ohio	40,466		250*	250*	1,400	"
WJFJ	Hagerstown, Md.	33,491		250	250	1,240	"

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WAZL	Hazleton, Pa.	38,000	N.B.C. Red, Blue	250	250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red	100	100	1,400	"
WFEA	Manchester, N. H.	77,685	N.B.C. Red	5,000*	5,000*	1,370	"
Mid-West Group							
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,698	C.B.S.	5,000	5,000	1,290	"
KSO	Des Moines, Ia.	183,973	N.B.C. Blue	5,000	5,000*	1,460	"
WLAV	Grand Rapids, Mich.	209,873		250	250	1,340	"
WFBI	Wichita, Kans.	127,308		5,000	1,000	1,070	"
WROK	Rockford, Ill.	105,259		1,000	500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	5,000	600	"
KDTH	Dubuque, Ia.	43,892		1,000	1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	250	1,490	"
KWFC	Hot Springs, Ark.	21,370		250	250	1,340	"
KWOS	Jefferson City, Mo.	24,268		250	250	1,240	"
KTSW	Emporia, Kans.	13,188		250	250	1,400	"
KGGF	Coffeyville, Kans.	17,355		1,000	500	690	"
KBTM	Jonesboro, Ark.	11,729		250	100	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	5,000	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	250	1,400	"
Southeast Group							
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	250	1,340	"

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APPENDIX A—Continued
Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)		Hours of Operation
				Day	Night			
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	1,240	Unlimited	
WSLS	Roanoke, Va.	110,593		250	250	1,490	"	
WCOS	Columbia, S. C.	89,555	N.B.C. Blue	250	250	1,400	"	
WCMI	Huntington-Ashland, W. Va.-Ky.	170,979		250	250	1,340	"	
WAJR	Winston-Salem, N. C.	109,833		250	250	1,340	"	
WMRC	Greenville, S. C.	34,734		250	250	1,490	"	
WRAL	Raleigh, N. C.	46,897		250	250	1,240	"	
WLVA	Lynchburg, Va.	44,541		250	250	230	"	
WBTM	Danville, Va.	32,749		250	250	1,400	"	
WSTP	Salisbury, N. C.	19,037		250	250	1,490	"	
WBBB	Rurlington, N. C.	12,198		1,000	.....	920	Daytime	
Southern Group								
WATL	Atlanta, Ga.	442,284		250	250	1,400	Unlimited	
WNOE	New Orleans, La.	540,030		250	250	1,450	"	
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	500	1,460	"	
WGRC	Louisville, Ky.	434,408		250	250	1,400	"	
WSGN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,000	610	"	
WSIX	Nashville, Tenn.	241,769		5,000*	5,000*	960*	"	
WJHP	Jacksonville, Fla.	195,619	N.B.C. Blue	250	250	1,320	"	
WDEF	Chattanooga, Tenn.	193,215		250	250	1,400	"	
WBIR	Knoxville, Tenn.	151,829		250	250	1,240	"	
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	500	1,380	"	
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,000	1,280	"	

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APPENDIX A—Continued
Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KCMC	Texarkana, Tex.	28,840		250	250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	250	1,450	"
KBST	Big Spring, Tex.	12,604		100	100	1,490	"
KRRV	Sherman, Tex.	17,156		1,000	1,000	910	"
KTEM	Temple, Tex.	15,344		250	250	1,400	"
KRGV	Weslaco, Tex.	6,893	N.B.C. Red, Blue	1,000	1,000	1,290	"
Northwest Group							
WHBL	Sheboygan, Wis.	40,368		1,000*	1,000*	1,330	"
WHBY	Appleton, Wis.	28,436		250	250	1,230	"
WFHR	Wisconsin Rapids	11,416		250	250	1,340	"
KFIZ	Fond Du Lac, Wis.	27,209		250	250	1,450	"
WSAU	Wausau, Wis.	27,268		250	250	1,400	"
WHDF	Calumet, Mich.	Under 6,000		250	250	1,400	"
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	100	1,230	"
KTRI	Sioux City, Ia.	87,791		250	250	1,450	"
KVOX	Fargo-Moorhead, N. D.	42,071		250	250	1,340	"
KVFD	Ft. Dodge, Ia.	22,904		250	250	1,400	"
KWNO	Winona, Minn.	22,490		250	250	1,230	"
KGCU	Bismarck-Mandan, N. D.	22,181		250	250	1,270	"
KABR	Aberdeen, S. D.	17,015		250	250	1,420	"
KLPM	Minot, N. D.	16,577		5,000	5,000	1,390	"
KATE	Albert Lee, Minn.	12,200		1,000	1,000	1,450	"
KGDE	Fergus Falls, Minn.	10,848		250	250	1,230	"
KRMC	Jamestown, N. D.	8,790		250	250	1,400	"

KDLR	Devils Lake, N. D.	6,204	250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623	250	250	1,340	"
WJMS	Ironwood, Mich.	13,369	250	250	1,450	"
WATW	Ashland, Wis.	11,101	100	100	1,400	"
Mountain Group						
KLO	Ogden-Salt Lake City, Utah	204,488	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479	1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,995	1,000	1,000	910	"
KOVO	Provo, Utah	18,071	250	250	1,240	"
KEUB	Price, Utah	5,214	250	250	1,450	Unlimited
Group Outside United States						
KGMB	Honolulu, T. H.		5,000	5,000	500	"
KHBC	Hilo, T. H.		250	250	1,230	"
KGBU	Ketchikan, Alaska		500	500	930	"
CKLW	Windsor, Ontario (Previously listed)					

* Construction permit only.

NOTE: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures, metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

[fol. 341]

APPENDIX B

Comparison of Facilities of Broadcast Stations Affiliated with
the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9 ^a	3 ^a	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1	..	..
		19 ^a	8 ^a	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	..	2	1
	10,000 "	..	1	..	1
Regional (1 kw. to 5 kw.)		2 ^a	8 ^a	7	5 ^a
	1,000,000 up	3	6	5	8
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
Regional (less than 1 kw. at night)		60 ^a	62 ^a	69	57 ^a
	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	..	7
	25,000 "	2	2	..	..
Local (100 w. to 250 w.)	10,000 "	1	2	..	1
		5 ^a	9 ^a	..	8 ^a
	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35 ^a	61 ^a	20	106 ^a

[fol. 342]

APPENDIX B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with
the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	..	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	..	..
	10,000 "	1	1	1	2
		2 ¹	3 ¹	..	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	..
	500,000 "	..	1	1	1
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1 ¹	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1 ¹	1 ¹	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

¹ WFAA-WBAP treated as one full-time station.² WENR-WLS treated as one full-time station.³ Includes 2 stations affiliated with both Red and Blue.⁴ Includes 1 station affiliated with both Red and Blue.⁵ Includes 1 station primarily affiliated with N.B.C. Blue.⁶ Includes 19 stations affiliated with both Red and Blue.⁷ Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.⁸ Includes 4 stations on both N.B.C. Red and Blue.⁹ Includes 3 stations primarily with N.B.C. Blue.¹⁰ Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber

FW:mk

Enc.

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

GENTLEMEN:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

(1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, you will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provisions of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101, 3.108 both inclusive of the Regulations of [fol. 345] the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified, said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.
By Fred Weber, General Manager.

FW:pwh.

Approved _____

Date _____

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of ———, 194—, between Mutual Broadcasting System, Inc., an Illinois corporation (hereinafter called "Mutual"), and ——— (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station ———, located at ——— (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served, full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs:

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, commencing on ———, 194—, of a program transmission line extending to——,

2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

[fol. 348] If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is

unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said city; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on ~~the~~ (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

[fol. 349] (A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as against other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclu-

sive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's programs, Mutual has established special competitive volume discounts for advertiser [fol. 350] tisers contracting for periods of time on a substantial number of such stations. The minimum number of stations which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive con-

ditions. Accordingly, if any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special Volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—	20% discount
26 broadcasts—	25% discount
52 broadcasts—	35% discount
104 broadcasts—	40% discount
156 broadcasts—	42½% discount
208 broadcasts—	45% discount
260 broadcasts—	50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network Rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the [fol. 351] advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broad-

casts for the additional period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge any other advertiser for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

(1) —% of such receipts from advertisers;

(2) Line and service charges of \$_____ per month;

(3) License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the [fol. 352] share to be allocated to the Broadcaster depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interruptions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro-

gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract, except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made [fol. 353] by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall (for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other purpose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of \$——

on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago ——— line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting [fol. 354] on the Station, and shall not consent to the re-broadcasting of any of these programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad-

Broadcaster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organization, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and [fol. 355] the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of — years, ending — —, 194—, and shall then be renewed on the same terms and conditions for a further period of — years, and so on for successive further periods of — years each, unless and until either party shall, at least — days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend-

ing to — — shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

[fol. 356] 12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communications Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.

By

Date

By

Date

[fol. 357]

APPENDIX F

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y. ²	11,690,520	1	6	14	3
Los Angeles, Cal. ³	2,904,596	3	8	13	4
Nine Full-time Commercial Stations					
Chicago, Ill. ²	4,499,126	2	5	9	5
San Francisco-Oakland, Cal. ³	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass. ²	2,350,514	5	6	8	3
Seven Full-time Commercial Stations					
Philadelphia, Pa. ²	2,898,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich. ²	2,295,867	6	3 ⁴	6 ⁴	3
Washington, D. C. ²	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo. ²	634,083	18	5 ⁴	6 ⁴	3
Seattle, Wash. ²	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa. ²	1,994,060	7	4 ⁴	5	3
St. Louis, Mo. ²	1,367,977	8	4	5	3
Baltimore, Md. ²	1,046,692	11	3	5	3
Minneapolis-St. Paul, Minn. ²	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y. ²	857,719	14	3	5	4 ⁴
Cincinnati, O. ²	789,309	16	4	5	3
New Orleans, La. ²	540,030	20	3	5	3

Portland, Ore.	403,405	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	2

Four Full-time Commercial Stations

Providence, R. I. ²	711,500	17	0 ⁰	4	3
Scranton-Wilkes-Barre, Pa.	629,581	19	0	4 ¹⁰	1 ¹⁰
Hartford-New Britain, Conn. ²	502,193	22	2	4	3
Indianapolis, Ind. ¹	455,357	23	4	4	3
Atlanta, Ga.	442,294	25	3	4	3
Louisville, Ky. ¹¹	434,408	25	2	4	3
Albany-Schenectady-Troy, N. Y. ²	431,575	27	1	4	3
Springfield-Holyoke, Mass. ¹³	394,623	31	2	4	3
Dallas, Tex.	376,548	33	2	4	2
Memphis, Tenn.	332,477	39	4 ¹¹	4 ¹¹	3 ¹¹
Syracuse, N. Y. ¹⁵	258,352	39	3	4	3
Oklahoma City, Okla.	221,229	48	4	4	2
Tampa-St. Petersburg, Fla.	209,693	53	4	4	3
Fort Worth, Tex.	207,677	57	4	4	3
Tacoma, Wash.	156,018	76	4 ¹¹	4 ¹¹	3 ¹¹
Spokane, Wash.	141,370	84	2	4	0
			3	4	3

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1947

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Three Full-time Commercial Stations					
Cleveland, O. ¹	1,214,943	10	3	3	3
Milwaukee, Wis. ⁷	790,336	15	3	3	3
Houston, Tex.	510,397	21	3	3	3
Rochester, N. Y. ¹¹	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	2
Youngstown, O.	372,428	34	2	3	2
Akron, O. ¹²	349,705	36	2	3	2
Worcester, Mass. ¹⁴	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia. ¹¹	287,698	45	2	3	2
San Diego, Cal.	256,368	49	3	3	1
Miami, Fla.	256,537	50	3	3	3
Richmond, Va. ¹²	245,674	51	3	3	3
Nashville, Tenn.	241,769	52	2	3	2
Salt Lake City, Utah	204,488	58	3	3	3
Jacksonville, Fla.	195,619	63	1	3	3
Chattanooga, Tenn.	193,215	64	2	3	3
Tulsa, Okla.	188,562	66	3	3	3
Des Moines, Ia. ¹	183,973	68	3	3	3
Duluth-Superior, Minn.-Wis.	157,098	75	3	3	2
Knoxville, Tenn.	151,829	78	3	3	2
Keamsport-Port Arthur, Tex.	138,608	85	3	3	2
Wichita, Kans.	127,308	92	3	3	1

Little Rock, Ark. 126, 724
 Phoenix, Ariz. 121, 828
 Shreveport, La. 112, 225
 Springfield, Mo. 70, 514

Two Full-time Commercial Stations

Columbus, O.¹²
 Toledo, O.¹⁴
 Lowell-Lawrence-Haverhill, Mass.
 Allentown-Bethlehem-Easton, Pa.
 Norfolk-Portsmouth-Newport News, Va.
 Fall River-New Bedford, Mass.
 Dayton, O.¹⁴
 Bridgeport, Conn.¹²
 Grand Rapids, Mich.
 Wheeling, W. Va.
 Wilmington, Del.¹⁴
 Davenport-Rock Island-Moline, Ia.-Ill.¹²
 Harrisburg, Pa.¹²
 Huntington-Ashland, W. Va.-Ky.
 Sacramento, Cal.

365, 796
 341, 663
 334, 969
 325, 142
 323, 326
 272, 648
 271, 513
 216, 621
 209, 873
 196, 340
 188, 974
 174, 995
 173, 367
 170, 979
 158, 999

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APPENDIX F—Continued

[fol. 361]
Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,332	86	1	2	2
Fort Wayne, Ind. ¹¹	134,385	88	1	2	2
Erie, Pa.	134,039	89	2	2	2
Savannah, Ga.	117,970	95	2	2	2
El Paso, Tex.	115,801	96	2	2	1
Mobile, Ala.	114,906	97	2	2	2
Charlotte, N. C.	112,986	99	2	2	2
Roanoke, Va.	110,593	102	2	2	1
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me. ¹²	106,566	105	2	2	2
Atlantic City, N. J.	100,096	108	2	2	1
Charleston, S. C.	98,711	109	2	2	2
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,484	115	2	2	2
Lincoln, Nebr. ¹³	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	1
Augusta, Ga.	87,800	118	2	2	2

Sioux City, Ia.
 Manchester, N. H.
 Asheville, N. C.
 Macon, Ga.
 Corpus Christi, Tex.
 Amarillo, Tex.
 Raleigh, N. C.
 Dubuque, Ia.
 Tucson, Ariz.
 Orlando, Fla.
 Albuquerque, N. M.
 Santa Barbara, Cal.
 Greenville, S. C.
 Bangor, Me.
 Bakersfield, Cal.
 Hot Springs, Ark.
 Albany, Ga.

87,791
 81,932
 76,324
 74,830
 70,677
 53,463
 46,897
 43,892
 36,818
 36,736
 35,449
 34,958
 34,734
 29,822
 29,252
 21,370
 19,055

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One Full-time Commercial Station

308,228
 200,352
 200,128

New Haven, Conn.
 Canton, O.
 Trenton, N. J.

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APPENDIX F—Continued

[fol. 363] Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	175,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Saginaw-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	90	1	1	0
Lancaster, Pa.	132,037	91	1	1	0
San Jose, Cal.	129,367	98	1	1	1
Altoona, Pa.	114,094	103	1	1	1
Lansing, Mich.	110,356	106	1	1	0
Austin, Tex.	106,193	107	1	1	0
Rockford, Ill.	105,259	112	1	1	1
York, Pa.	92,627	113	1	1	1
Columbus, Ga.	92,478	120	1	1	0
St. Joseph, Mo.	86,991	121	1	1	0
Berkeley, Cal.	85,547	123	1	1	1
Terre Haute, Ind.	83,370	124	1	1	0
Stockton, Cal.	79,337		1	1	0
Madison, Wis.	78,349		1	1	1

Topeka, Kans.	77,749
Springfield, O.	77,406
Kalamazoo, Mich.	77,213
Cedar Rapids, Ia.	73,219
Greensboro, N. C.	73,055
Galveston, Tex.	71,677
Waco, Tex.	71,114
Durham, N. C.	69,683
Decatur, Ill.	65,764
Pueblo, Colo.	62,039

No Full-time Commercial Stations

Hamilton-Middletown, O.	112,686
Waterloo, Ia.	67,050

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts
with Affiliates Permit No Access, or Only a Limited Access, by Mutual
(November 1, 1941)

I

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Youngstown, O.	Johnstown, Pa.	Columbus, Ga.
Toledo, O.	South Bend, Ind.	Jackson, Miss.
Dayton, O.	Charleston, W. Va.	Augusta, Ga.
Miami, Fla.	Fort Wayne, Ind.	Terre Haute, Ind.
Utica-Rome, N. Y.	Erie, Pa.	Madison, Wis.
Wheeling, W. Va.	Savannah, Ga.	Springfield, O.
Flint, Mich.	El Paso, Tex.	Kalamazoo, Mich.
Reading, Pa.	Altoona, Pa.	Greensboro, N. C.
Peoria, Ill.	Lansing, Mich.	Durham, N. C.
Sacramento, Calif.	Portland, Me.	Pueblo, Colo.
Saginaw-Bay City, Mich.	Charleston, S. C.	Topeka, Kan.
	Montgomery, Ala.	Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear channel outlets, and in which no full-time regional or clear-channel facilities are available.

New Orleans, La.	San Antonio, Tex.
Scranton-Wilkes-Barre, Pa.	Oklahoma City, Okla.
Hartford-New Britain, Conn.	Chattanooga, Tenn.
Atlanta, Ga.	Wilmington, Del.
Louisville, Ky.	Duluth-Superior, Minn.-Wis.
Albany-Schenectady-Troy, N. Y.	Knoxville, Tenn.
Rochester, N. Y.	Little Rock, Ark.
Columbus, O.	Mobile, Ala.
Akron, O.	Roanoke, Va.
Lowell-Lawrence, Mass.	Winston-Salem, N. C.
Allentown, Pa.	Sioux City, Iowa
Norfolk, Va.	Lincoln, Neb.
	Macon, Ga.
	Amarillo, Tex.

III

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet a station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.
Houston, Tex.
Birmingham, Ala.
Richmond, Va.
Salt Lake City, Utah
Jacksonville, Fla.
Tulsa, Okla.
Des Moines, Ia.
Harrisburg, Pa.

(b) The only independent full-time outlet available is a local station;

Memphis, Tenn.
Omaha, Nebr.
Bridgeport, Conn.

Binghamton, N. Y.
Evansville, Ind.
Lancaster, Pa.
Charlotte, N. C.
York, Pa.
Columbia, S. C.
Manchester, N. H.
Cedar Rapids, Ia.

Spokane, Wash.
Corpus Christi, Tex.

Footnotes

¹ Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

² Basic on both NBC Red and Blue, and CBS.

³ Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

⁴ These figures do not include CKAW, Windsor, Canada. Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

Footnotes—Continued

[fol. 367]

- * These figures include WREN; the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.
- * The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.
- * Basic on both NBC Red and Blue.
- * Two stations are affiliated with Columbia, WGR and WKBW.
- * Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WFCI in Pawtucket, R. I., a city adjacent to Providence.
- * The Columbia station is WGBI, a station sharing time with WQAN.
- * Basic on NBC Red and CBS.
- * Basic on CBS.
- * Basic on NBC Blue.
- * These figures include KRLD and KGKO.
- * Basic on NBC Blue and CBS.
- * Basic on NBC Red.
- * These figures include KWKH, 50 kw.
- * This includes WBT, 50 kw.
- * KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.
- * This station is WPTF, 50 kw.
- * This includes KOB, 50 kw.
- * These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.
- * Berkeley is not listed as a metropolitan area; it would rank 121st in population...
- * Columbia affiliate, operates part-time.
- * WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

[fol. 368]

APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440
Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached
cancellation of the Ballantine program. However, as dis-
cussed over the telephone we plan to move the program
from the ~~Mutual~~ Network after the broadcast of Friday,
October 31.

Whenever you are able to discuss shortrate and payment
details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.)
Linnea Nelson.

L. Nelson: AW_Q

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 23, 1941.

Mutual Broadcasting System, 1440 Broadway, New York
City.

GENTLEMEN: RE: P.-BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client
as follows:

[fol. 369] One-half hour—9:30 to 10:00 P. M. New York
Time.

44 times—once a week—every Friday.

November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.

There is to be no broadcasting after October 31, 1941.

This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

[fol. 370]

APPENDIX H.

Final Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,

New York,

October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 33rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.)
Linnea Nelson.

L. Nelson: AW. cc: Mr. Wood.

J. Walter Thompson Company

420 Lexington Avenue,

New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

[fol. 371] One-half hours—9:30 to 10:00 P. M. New York Time.

39 times—once a week—every Friday.

December 12, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.

There is to be no broadcasting after December 5, 1941.

This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Liunea Nelson.

[fol. 372]

APPENDIX I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting..

October 27, 1941.

Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

Variety.

October 29, 1941.

Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

[fol. 373]

"Fly" in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed nasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-

studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola, the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure [fol. 374] ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period.

The agency asked Mutual for a release from its contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five weeks of the 13-week cycle. This obligation amounts to \$45,800. Ballantine's appropriation for time over the 52 weeks is \$200,000.

When Thompson, according to Mutual, asked for the re-[fol. 375] lease it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence; Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.

October 29, 1941.

Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine aler, and the expectation that other beer accounts may go NBC.

[fol. 376]

APPENDIX J

Excerpt from Trade Journal on March of Time Program Broadcasting.

October 13, 1941.

Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

[fol. 377]

APPENDIX K

Excerpts from Trade Journals on Coca-Cola Program

Variety.

October 8, 1941.

Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling
Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.

October 13, 1941.

Page 14.

Coca Cola Series Conflicts on Blue.

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-

Cola broadcasts on Mutual and the Sterling Products broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

[fol. 378] • Other Disputes Solved

These programs start on Oct. 20 and '22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for Lucky Strikes, under the NBC rule prohibiting continuous broadcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 379] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA ss:

TELFORD TAYLOR, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission;

(2) Attached hereto are certified copies of (a) letter from National Broadcasting Company to a licensee, dated December 10, 1941; (b) page 35 from the applications of National Broadcasting Company and Radio Corporation of America for the assignment of license of Station WENR (file B4-AL-328), giving reasons for the requested assignment; (c) Order of the Commission dated December 23, 1941, approving the assignment of licenses of Stations WJZ, WENR and KGO from National Broadcasting Company to Radio Corporation of America; (d) Order of the Commission dated December 23, 1941, granting the applications of National Broadcasting Company, Inc., and M. A. Leese Radio Corporation for assignment of license of Station WMAL to M. A. Leese Radio Corporation;

(3) Affiant submits that the attached material is relevant on the issues sought to be raised by plaintiffs' Motion for Preliminary Injunction, particularly with respect to Regulations 3.101, 3.106 and 3.107.

Telford Taylor.

Subscribed to and sworn before me this third day of January, 1942. Stephen Tuhy, Jr., Notary Public. My commission expires Oct. 14, 1943. (Seal.)

[fol. 380] National Broadcasting Company, Inc.

New York, N. Y.

December 10, 1941.

William S. Hedges, Vice President.

GENTLEMEN:

As you know, we have instituted suit against the Federal Communications Commission for the purpose of securing

a judicial determination of the Commission's power to regulate business practices as attempted by it in its Network Broadcasting Order of May 2, 1941. Although it is the firm position of NBC that the Order is wholly outside the Commission's jurisdiction, NBC does not believe that its position upon this point of law should prevent it from making its own decisions of business policy.

During these times of emergency all of our efforts should be devoted to the maintenance and improvement of our nationwide network broadcasting services which play such an important part in sustaining national morale. NBC has consistently maintained that radio's vital contribution to the national defense will be strengthened by setting aside all disputes not essential to the existence of the industry. This has direct application to our present situation.

The Commission and others have criticized several provisions of our network affiliation contracts. While we believe that all of these provisions are desirable for network operation in the public interest, both from the stations' standpoint and our own, we do not believe that all of them are indispensable. Last summer, you will recall, we deleted some of these provisions from our contracts.

Now we are writing to inform you that NBC has decided to eliminate as a term of network affiliation any obligation pursuant to which an NBC affiliate may not broadcast the programs of another network at such times as do not conflict with the station's obligation to broadcast NBC programs. You may deem this letter a modification of your contract of network affiliation with us to the extent that such contract may be inconsistent with the foregoing. All other provisions of the contract, including provisions concerning network optional time, remain unchanged.

[fol. 381] We firmly believe that the indispensable element in every network affiliation contract is a provision giving the network a firm option on a reasonable amount of time, exercisable on reasonable notice. We do not believe that the provisions of the Network Broadcasting Order permitting so-called "non-exclusive option time" on 56 days notice are workable. Our suit against the Commission seeks to preserve the all-important right to obtain a firm option of the type we regard as essential to the continuance

of the present high standard of nationwide network broadcasting.

Very truly yours, National Broadcasting Company,
Inc. By (signed) William S. Hedges, Vice President.

[fol. 382] Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached letter is a true and correct copy of a letter dated December 10, 1941, sent by National Broadcasting Company to a licensee, and filed by it with the Commission pursuant to Section 43.1 of the Commission's Rules and Regulations and Form 335. Similar letters to other licensees are on file with the Commission.

Federal Communications Commission, T. J. Slowie,
Secretary.

[fol. 383] Reasons for Assignment

21. (a) Give here the reasons for the proposed assignment, the specific objects sought, and benefits to be attained upon the approval of this application. Upon approval of this application the assignor will be in a position to effect a separation of the business of the station from that of the assignor and the assignee will be in a position and will be willing to comply with the view with respect to the disposition of the station expressed by the Commission in its report on May 2nd, 1941, in Docket 5060. It is the position of RCA and NBC that the order of the Commission based on its report of May 2nd, 1941, in Docket 5060 is wholly outside the Commission's jurisdiction. RCA and NBC do not believe that their position upon this point of law should prevent them from making their own decisions of business policy. It is believed that the station is presently rendering a high type of public service and this level of service is to be maintained. It is not presently anticipated that any change in service will be made.

22. There are submitted herewith the names and addresses of all counsel (legal, engineering, or accounting), together with the name and address of firm, if any, with which connected, who have prepared, or assisted in the preparation of, the application and exhibits. (Show opposite the name of each the part of application or specific exhibit or exhibits prepared.)

Authority of any Other Regulatory Agency Obtained

23. If any part of the proposal involved in this application is subject to regulation or approval by any other Federal or State body, show here the character and status of such proceeding and submit certified copies of all pleadings filed therewith, together with any orders issued by said body. None required.

[fol. 384]

Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached page is a true and correct copy of page 35 from the applications of National Broadcasting Company and Radio Corporation of America for assignment of license of Station WENR (File B4-AL-328) giving the reasons for the requested assignment and that a similar statement is contained in the applications of National Broadcasting Company and Radio Corporation of America for the assignment of licenses of Stations KGO and WJZ (Files B5-AL-326, and B1-AL-327).

Federal Communications Commission, T. J. Slowie,
Secretary.

[fol. 385] BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File Nos. B5-AL-326. B1-AL-327. B1-AL-328

In re Applications of

NATIONAL BROADCASTING COMPANY, INC., Assignor,
and

RADIO CORPORATION OF AMERICA, Assignee,

For Consent to Assignment of Licenses of Stations KGO,
WJZ and WENR

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the above-described applications; and

It Appearing that the applicants represent that the transfer of the properties and licenses of Stations KGO, WJZ and WENR, as proposed in these applications, is intended as an initial step toward the segregation of the Blue Network assets of the National Broadcasting Company; that immediate preparations will be made for the transfer of station properties and licenses of Stations KGO, WJZ and WENR to a new subsidiary of Radio Corporation of America; and that these steps are proposed for the purpose of making ultimate disposition of the Blue Network and complying with the views expressed by the Commission in its report of May 2, 1941, Docket 5060; and

It Appearing Further from examination of the applications and the matters submitted in support thereof that the public interest would be served by the granting of the same;

It Is Ordered, That the aforesaid applications Be, and They Are Hereby, Granted.

Federal Communications Commission, T. J. Slowie,
Secretary.

[fol. 386] BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File No. B1-AL-315. Docket No. 6071

In re Applications of

NATIONAL BROADCASTING Co., INC. (WMAL)

and

M. A. LEESE RADIO CORPORATION
For Assignment of License

and

NATIONAL BROADCASTING Co., INC. (WMAL)
For Renewal of License

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the petition of The Evening Star Newspaper Company and M. A. Leese-

Radio Corporation to reconsider and grant the above-entitled application for assignment of license; and

It Appearing that on February 28, 1933; the Federal Radio Commission granted its consent to the assignment of license for the operation of Station WMAL from M. A. Leese Radio Corporation to the National Broadcasting Co., Inc.; that the National Broadcasting Co., Inc., has since operated said station, using equipment owned and leased to it by M. A. Leese Radio Corporation; that on May 1, 1938, the entire stock of M. A. Leese Radio Corporation was purchased by The Evening Star Newspaper Company; that since May 1, 1938, M. A. Leese Radio Corporation has expended the sum of approximately \$150,000 in new construction and equipment of Station WMAL, such sum having been advanced by The Evening Star Company as the sole stockholder of M. A. Leese Radio Corporation; and that a grant of said application will eliminate the multiple control by National Broadcasting Co., Inc., of radio broadcast stations in Washington, D. C.; and

It Further Appearing upon reexamination of said assignment of license application in the light of the said petition that public interest, convenience and necessity will be served by the granting thereof; and

[fol. 387] It Further Appearing that the Commission has heretofore designated for hearing the application for renewal of license for the operation of Station WMAL, and that the assignment of said license to M. A. Leese Radio Corporation eliminates the conditions which caused the Commission to designate said renewal of license application for hearing; and

It Further Appearing upon reexamination of the application for renewal of license of Station WMAL that public interest, convenience and necessity will be served by the granting thereof;

It Is Ordered that the petition for reconsideration and grant of the above-described assignment of license application Be, and It Is Hereby, Granted; and that said application Be, and It Is Hereby, Granted.

It Is Further Ordered, upon the Commission's own motion that the hearing heretofore scheduled upon the above-described renewal of license application for Station WMAL Be, and It Is Hereby, Cancelled; and that said application Be, and It Is Hereby, Granted.

Federal Communications Commission, T. J. Slowie,
Secretary.

[fols. 388-390] [Endorsed:] United States District Court, Southern District of New York. National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, Plaintiffs, vs. United States of America and the Federal Communications Commission, Defendants. Affidavit in Opposition to Plaintiffs' Motion for Preliminary Injunction. Samuel Brodsky, Special Assistant to the Attorney General. Telford Taylor. Thomas E. Harris.

[fol. 391] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted].

REPLY AFFIDAVIT OF NILES TRAMMELL

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

Niles Trammell, being duly sworn, deposes and says:

I am the President of the National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs in this action. This affidavit is made in reply to the affidavits of Fred Weber and Hope H. Barroll, both verified December 11, 1941 and submitted by Mutual Broadcasting System, Inc. in opposition to motions for preliminary injunction.

I

Mutual in the Advertising Market

The Mutual Broadcasting System is not always so downhearted about its competitive position as Mr. Weber's affidavit would indicate. A document entitled "A Presentation of the Mutual Broadcasting System Spring 1941" issued by Mutual Broadcasting System, states that Mutual Broadcasting System has a 150% advantage over the Blue Network and then continues:

"Mutual has a

24% advantage in
the 1st hundred markets

48% advantage in
the 2nd hundred markets

49% advantage in
the 3rd hundred markets

1ST HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

Here NBC Blue has a full-time outlet;
Mutual has not

Columbus	Ohio
San Antonio	Texas
Nashville	Tenn.
New Haven	Conn.
Springfield	Mass.
Fort Worth	Texas
Grand Rapids	Mich.
Seranton	Pa.
Norfolk	Va.
Wichita	Kans.
Wilmington	Del.
Chattanooga	Tenn.
Knoxville	Tenn.
Fresno	Calif.
Duluth	Minn.
Canton	Ohio
Tacoma	Wash.
Wilkes-Barre	Pa.
Lincoln	Neb.
New Bedford	Mass.

Retail Sales

\$1,009,461,000

Milwaukee	Wis.
Toledo	Ohio
Richmond	Va.
Miami	Fla.
Youngstown	Ohio
Flint	Mich.
Sacramento	Calif.
Jacksonville	Fla.
Fort Wayne	Ind.
Lansing	Mich.
Erie	Pa.
Tampa	Fla.

Retail Sales

\$885,755,000

[fol. 303]

2ND HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

Here NBC Blue has a full-time outlet;
Mutual has not

Waterbury	Conn.
Little Rock	Ark.
Rockford	Ill.
Fall River	Mass.
Lowell	Mass.
Roanoke	Va.
Austin	Texas
Huntington	W. Va.
Lexington	Ky.
Mobila	Ala.
Winston-Salem	N. C.
Elmira	New York
Macon	Ga.
San Bernardino	Calif.
Yakima	Wash.
Steubenville	Ohio
Greenville	S. C.
Waco	Texas
Raleigh	N. C.
Pittsfield	Mass.

Retail Sales

\$485,478,000

Stockton	Calif.
Evansville	Ind.
Wheeling	W. Va.
Springfield	Ill.
Manchester	N. H.
Sioux City	Iowa
Terre Haute	Ind.
Columbia	S. C.
Poughkeepsie	New York
Augusta	Ga.
Jackson	Mich.
Battle Creek	Mich.
Jackson	Miss.

Retail Sales

\$327,112,000

3RD HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

NBC Blue has a full-time outlet;
Mutual has not

Amarillo.....	Tex.
Easton.....	Pa.
Fargo.....	N. D.
Lynchburg.....	Va.
Lewiston.....	Maine
New London.....	Conn.
Santa Ana.....	Calif.
Portsmouth.....	Ohio
Hagerstown.....	Md.
Danville.....	Va.
Bellingham.....	Wash.
Everett.....	Wash.

Orlando.....	Fla.
Johnstown.....	New York
Reno.....	Nev.
Baton Rouge.....	La.
Pueblo.....	Colo.
Bay City.....	Mich.
Spartanburg.....	S. C.
Enid.....	Okla.

Retail Sales

Retail Sales

\$185,893,000

\$124,541,000

[fol. 394] Naturally you will want to ask this question
 * * * with *twice* the popularity in the leading 32 cities
 * * * with coverage of *more* of the leading 300 markets
 * * * will Mutual this fall be more expensive than its
 Blue competition?

The answer is * * * NO."

II

The Network Affiliation "Market"

It is time that the true situation with respect to the network affiliation "market" be made clear.

The Mutual Broadcasting System attained the status of a nationwide network organization in 1936. Since that date practically every station now affiliated with NBC has entered into its present contract with NBC and each of these stations was free to affiliate itself with Mutual or any other network organization had it so desired.

Since 1938 affiliation contracts between NBC and approximately 80 radio stations then affiliated with NBC have expired and the stations have had a choice of affiliation. From October 1, 1938 through the end of 1941, NBC entered into contracts of affiliation with approximately 100 additional stations, which of course were free to affiliate themselves with any other network organization. Since 1938 only five former affiliates of the NBC have chosen to leave NBC for the Mutual Broadcasting System. These stations are located in

Boston

Providence

Bridgeport
Baltimore
Pittsburgh

These facts speak for themselves.

[fol. 395]

III

Baltimore Radio Show, Inc. and Station WFBR

In his affidavit verified December 11, 1941, Mr. Hope H. Barroll, Executive Vice President of Baltimore Radio Show, Inc., contends that NBC had the power under its affiliation contract with Baltimore Radio Show, Inc. to switch its Station WFBR from the Red Network to the Blue Network.

It should first be pointed out that *never* in the history of the National Broadcasting Company, has an affiliate been shifted from one of the NBC networks to another during the life of its contract against its wish. No effort was made in the case of Station WFBR to shift it from the Red Network to the Blue Network during the life of its contract which expired on September 30, 1941.

Upon the expiration of its affiliation contract, Station WFBR became affiliated with Mutual Broadcasting System. This change of affiliation from NBC to Mutual is an example of competition between network organizations for affiliated stations. An endeavor to make more than this of the case of WFBR is to totally disregard the commercial facts surrounding that situation.

For a considerable time prior to this change in affiliation Station WFBR had been dissatisfied with its network rate to advertisers upon which its compensation for the broadcasting of network commercial programs was based. Its network rate had initially been set at \$240 per hour and this was in excess of the rate warranted by its coverage when compared with other stations on the Red Network. Upon obtaining a grant of increase in power which made its network rate of \$240 per hour the usual rate for a station of the coverage which such increased power brought, the station felt dissatisfied and wanted an increase of \$60. This increase was not warranted by the coverage of Station WFBR when compared with other stations on the Red Network. NBC was willing to increase the network rate of Station WFBR by \$20, and did so. In spite of this increase, Station WFBR became increasingly dissatisfied with its network rate.

[fol. 396] The coverage of the NBC Red Network stations in Washington and in Philadelphia was such that the duplicated coverage of Station WFBR was considerably greater on the Red Network than it would have been had WFBR been on the Blue Network. NBC was consequently able to offer Station WFBR a higher network rate on the Blue Network. This, however, also was unsatisfactory to Station WFBR.

It was after the increase of \$20 an hour (when WFBR felt entitled to a \$60 increase) that there were increasing numbers of instances in which the station placed difficulties in the way of the exercise by NBC of options upon the station's time. It will be recalled that the time subject to options on the majority of NBC affiliates, including Station WFBR, is only 8½ hours per day, leaving ample time in which the affiliates, including Station WFBR, can schedule programs of local importance. NBC is currently utilizing 83.1% of the 8½ hours per day subject to option on the basic Red Network for network commercial programs. The amount of option time utilized by a network organization for a nationwide network commercial program varies from network to network. For example, on the basic Blue Network the 8½ hours subject to option are utilized only about half as much for the broadcasting of network commercial programs as on the Red. Any station choosing to affiliate itself with the Red Network must, therefore, expect heavy network commercial traffic within network option time. This is generally understood in the industry and, as it is amply remunerative to the affiliates, it is rare to find an affiliate on the Red Network endangering a program to the whole network by refusing to respect its contractual obligation.

[fol. 397]

IV

Distribution of Facilities Among Network Organizations

The affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Intervenor, seeks to indicate that the Mutual System has been prevented by NBC and CBS from obtaining outlets in various radio markets. The true facts of the matter can readily be made clear.

The United States Census of 1940 defined 140 metropolitan areas. These areas represent the most important

population centers in the United States and range in population from the New York metropolitan area, which includes such cities as Elizabeth, Jersey City, Newark, Paterson and Yonkers in addition to the five boroughs and which has a population of 11,690,520, to the 140th in rank, Amarillo, Texas, which has a total population of 53,463. It can readily be seen that there is a wide divergence in the station power required to cover the various 140 metropolitan areas.

In general, stations of high power are probably essential only for those areas having populations in excess of 500,000. The areas of lesser population can, with very few exceptions, be adequately covered by a 250 watt station.

Neither the Red Network of NBC nor the Blue Network has stations of high power in all of these 140 metropolitan areas. In fact the Red Network has a 250 watt station which it shares with the Blue in one area having a population of 629,581 while the Blue Network uses 250 watt stations in three of the areas having a population of 500,000 or greater. Mutual also uses stations of 250 watt power in three such areas. In the Scranton-Wilkes-Barre area Mutual is affiliated with one 250 watt station and one 100 watt station, while the Red and the Blue Networks share one 250 watt station located in Wilkes-Barre, Pennsylvania.

However, in so far as Mr. Weber's affidavit complains of the existing situation with respect to power, his complaint must be directed to the Federal Communications [fol. 398] Commission, which alone has authority to change that situation. The attack of Mr. Weber upon the other network organizations must, therefore, be confined to the charge that the other network organizations have, as affiliates, an undue proportion of available outlets. The following table shows the numerical distribution of outlets in the 140 first metropolitan areas:

Metropolitan Areas	Red Network	Blue Network	CBS	Mutual
1st 25	25	26	26	29
2nd 25	16	20	19	21
3rd 25	15	17	15	17
4th 25	15	15	14	13
5th 25	12	12	12	9
Next 15	4	4	6	5
Total	87	95	92	94

In these 140 areas there are 53 in which the Red Network does not have an affiliated station. There are 47 areas in which the Blue Network does not have an affiliated station and there are 52 areas in which Mutual does not have an affiliated station. NBC has never considered and its experience shows that it is not essential to network operation to have an affiliated station in every one of these high population centers. It is quite probable that, even though stations were available in many of the population centers in which neither the Red Network nor the Blue Network has an affiliated station, NBC would not desire to enter into contractual agreements with such stations because of problems of overlapping coverage. Neither do I believe that Mutual would desire to have an affiliated station in each of the first 140 metropolitan areas.

In only one of the first 25 markets, Milwaukee, Wisconsin, does Mutual lack an outlet and the Milwaukee outlet was available to Mutual prior to its affiliation with the Blue Network. From that fact it can be presumed that Mutual did not desire to affiliate with the station because the coverage [fol. 399] of their 50,000 watt station in Chicago, WGN, was regarded as perfectly satisfactory for this market.

In his affidavit Mr. Weber enumerated the cities in which the Red Network and the Blue Network or both have contracts with stations but in which he alleges Mutual is unable to obtain an outlet. For the purpose of comparison there are enumerated below the 24 cities in the first 140 metropolitan areas in which Mutual has an outlet but in which the Red Network does not have an outlet:

Seranton
 Rochester
 Springfield-Holyoke
 Akron
 Lowell-Lawrence
 New Haven
 Fall River-New Bedford
 San Diego
 Canton
 Moline-Davenport-Rock Island
 Huntington-Ashland
 Tacoma
 Binghamton
 Waterbury

Beaumont-Port Arthur
 San Jose
 Roanoke
 Austin
 Rockford
 Lincoln
 Sioux City
 Macon
 Cedar Rapids
 Waco

[fol. 400] The following list of 22 cities in the first 140 metropolitan areas are those in which Mutual has an outlet but in which the Blue Network does not have an outlet:

Scranton
 Lowell-Lawrence
 San Antonio
 New Haven
 Fall River-New Bedford
 Canton
 Wilmington
 Huntington-Ashland
 Tacoma
 Binghamton
 Waterbury
 San Jose
 Mobile
 Roanoke
 Winston-Salem
 Austin
 Rockford
 Lincoln
 Macon
 Cedar Rapids
 Waco
 Amarillo

For the purpose of further comparison there are enumerated below the cities in the first 140 population centers in which the Red Network has no affiliated station, the cities in which the Blue Network has no affiliated station and the cities in which the Mutual Network has no affiliated station:

[fol. 401] Red	Blue	Mutual
Rochester	Lowell-Lawrence-	Milwaukee
Springfield-Holyoke	Haverhill	Youngstown
Youngstown	San Antonio	Toledo
Akron	New Haven	Worcester
Lowell-Lawrence-	Worcester	Dayton
Haverhill	Fall River-New Bedford	Miami
New Haven	Canton	Salt Lake City
Fall River-New Bedford	Trenton	Trenton
Dayton	Utica-Rome	Utica-Rome
San Diego	Wilmington	Wheeling
Bridgeport	Reading	Flint
Canton	Huntington-Ashland	Reading
Trenton	Peoria	Peoria
Utica-Rome	Tacoma	Sacramento
Wheeling	Johnstown	Saginaw-Bay City
Flint	South Bend	Johnstown
Moline-Davenport-	Binghamton	South Bend
Rock Island	Waterbury	Charleston (W. Va.)
Huntington-Ashland	Racine-Kenosha	Racine-Kenosha
Peoria	San Jose	Fort Wayne
Sacramento	Savannah	Erie
Tacoma	Mobile	Phoenix
Saginaw-Bay City	Altoona	Savannah
South Bend	Hamilton-Middletown	El Paso
Binghamton	Shreveport	Altoona
Waterbury	Roanoke	Hamilton-Middletown
Beaumont-Port Arthur	Winston-Salem	Shreveport
Racine-Kenosha	Portland	Lansing
Erie	Austin	Portland
San Jose	Rockford	Atlantic City
Hamilton-Middletown	Atlantic City	Charleston
Roanoke	Charleston	Fresno
Lansing	Fresno	Montgomery
Austin	Columbus	Columbus
Rockford	Lincoln	Springfield (Ill.)
Atlantic City	St. Joseph	Jackson
Columbus	Topeka	Augusta
Springfield (Ill.)	Kalamazoo	St. Joseph
Lincoln	Asheville	Terre Haute
Augusta	Macon	Stockton
Sioux City	Cedar Rapids	Madison
St. Joseph	Greensboro	Topeka
Stockton	Galveston	Springfield (O.)
Topeka	Waco	Kalamazoo
Springfield (O.)	Durham	Asheville
Kalamazoo	Waterloo	Greensboro
Macon	Decatur	Galveston
Cedar Rapids	Amarillo	Springfield (Mo.)
Greensboro		Durham
Galveston		Waterloo
Waco		Decatur
Durham		Pueblo
Waterloo		
Decatur		
Pueblo		

[fol. 402] In order to complete the presentation there is shown below the list of cities in which the Red Network stations also take Mutual programs; the cities in which the Blue Network stations also take Mutual programs, and the

cities in which both the Red and Blue Network stations also take Mutual programs:

Red—	Charlotte
	Manchester
Blue—	Cleveland
	Providence
	Houston
	Birmingham
	Memphis
	Richmond
	Bridgeport
	Jacksonville
	Tulsa
	Des Moines
	Spokane
	Columbia
Red-Blue—	Harrisburg
	Evansville
	Lancaster
	York
	Corpus Christi

Finally there is tabulated below the 18 cities in which the Red and Blue Networks share stations:

Seranton-Wilkes-Barre
 Columbus (O.)
 Allentown-Bethlehem-Easton
 Norfolk
 Syracuse
 Nashville
 Grand Rapids
 Chattanooga
 Duluth-Superior
 Knoxville
 Charleston (W. Va.)
 Wichita
 Phoenix
 El Paso
 Montgomery
 Terre Haute
 Madison
 Springfield (Mo.)

[fol. 403] Discussion of population centers which do not come within the 140 metropolitan areas of the United States as defined by the United States Census is omitted from this affidavit. It is inconceivable that the failure of a network to have an affiliate in population centers of this importance would seriously affect its competitive position. However, it should be noted that in the population centers of less than 50,000 the Red Network has a total of 45 affiliates; the Blue Network has a total of 68 affiliates, while the Mutual Network has a total of 95 affiliates. Here again the total for the Red and the total for the Blue include 25 stations utilizing both the Red and Blue Networks.

V

Limitations Upon Facilities

The chief factor limiting the numbers of standard broadcast stations in the United States is that of interference. The considerations governing the Federal Communications Commission in determining the amount of interference compatible with the public interest, convenience and necessity are set forth in standards of good engineering practice promulgated by it. It is contended that the present number of cities in the United States having three or less full-time facilities is the inevitable and unalterable result of physical limitations.

For example, the limitation of facilities in Cleveland, which has three full-time stations and one part-time station, has been cited as an illustration of physical limitation upon possible standard broadcast facilities. However, the Commission has denied applications for additional facilities in Cleveland on the ground of technical limitations where the limitations relied upon have been repeatedly exceeded in subsequent grants in other cities. Indeed, these technical limitations have been exceeded by the Commission in over 40 cases, often to a much greater extent than would be necessary in Cleveland.

[fol. 404] In one case filed November 21, 1936, the Commission, on March 9, 1938, denied an application for a regional station in Cleveland. Although the Commission purported to rely on technical grounds, it further held in this case, and I quote:

"The area which the station proposes to serve now has program service from a number of existing stations."

and that:

"No such need is shown for additional broadcasting service as will warrant the establishment of an additional regional station, which because of interference, will be unable to serve as extensive an area as is normally expected to be served by a station of this class."

In another case, decided that same year, 1938, although the Commission found the applicant to be legally, technically and financially qualified to construct and operate the proposed station in Cleveland, it held that:

"The frequencies available for assignment to broadcast stations being limited, public interest would be served by an allocation of licenses to those who will, where need exists, render a broad, general public service."

and the Commission further held that:

"No need exists for an additional station in the area which would be served upon the basis of program service proposed to be rendered."

Therefore the Commission ruled that:

"Public interest, convenience and necessity will not be served by a granting of the application."

In a third case when the application for a regional station in Cleveland was denied on June 29, 1938, the Commission concluded; and again I quote:

[fol. 405] "The granting of this application would not cause objectionable interference to any established station. However, interference from existing stations would be expected to limit coverage of the proposed station to its 4.7 millivolt contour at night."

My engineers inform me that this limitation has since been frequently exceeded in other locations.

The Commission went on to say:

"While the evidence indicated that there *may* be need for an additional station in Cleveland, the degree of need shown by the applicant for this station is not of such a convincing and compelling nature as to warrant the Commission in departing so radically from standards of allocation and service which have been established as primary elements in determining whether a particular station would

serve the public interest, convenience and necessity, from the standpoint of the nation as a whole."

There are now applications pending for facilities in Cleveland, according to our examination of the record, the granting of which would give Cleveland six full-time stations. No action has been taken by the Commission on these applications.

If these applications are granted, Cleveland will have ample facilities. But if none is granted, NBC could be required, under the new regulations, to dispose of its only station in Cleveland, Station WTAM, which it has operated in the public interest for twelve years.

As further proof of the fact that there is no absolute limitation upon the possible number of facilities and of the fact that the radio art is dynamic and expanding, Table 1 shows the increase in the number of cities having five full-time stations, Table 2 shows the increase in the number of cities having four full-time stations, and Table 3 shows the increase in the number of cities having three full-time stations, progressively from 1938 to 1941.

[fol. 406]

TABLE 1

Cities with 5 or More Stations

1938	1939	1940	1941
Boston	"	"	"
Buffalo	"	"	"
Chicago	"	"	"
Cincinnati	"	"	"
Dallas-Ft. Worth	"	"	"
Detroit	"	"	"
Kansas City	"	"	"
Los Angeles	"	"	"
Milwaukee ¹	"	"	"
New York	"	"	"
Philadelphia	"	"	"
Pittsburgh	"	"	"
Portland	"	"	"
San Francisco	"	"	"
Seattle	"	"	"
St. Louis	"	"	"
Denver	"	"	"
Minneapolis-St. Paul	"	"	"
New Orleans	"	"	"
		Baltimore	"
		Bridgeport-New	"
		Haven-Waterbury	"
		Springfield-Holyoke ²	"
		Tacoma	"
		Washington, D. C.	"
		Everett, Wash.	"

¹ WMAQ, WENR-WLS, WBBM and WGN—Chicago deliver primary service in Milwaukee.

² WTIC—Hartford delivers primary service in Springfield-Holyoke.

[fol. 407].

TABLE 2

Cities with 4 Stations

(Absence of ditto denotes transference to Table 1)

1938	1939	1940	1941
Atlanta, Ga.	"	"	"
Hartford	"	"	"
Memphis	"	"	"
Oklahoma City	"	"	"
Salt Lake-Ogden	"	"	"
San Antonio	"	"	"
Baltimore	"	"	"
Minneapolis-St. Paul	"	"	"
New Orleans	"	"	"
Richmond, Va.	"	"	"
Washington, D. C.	"	"	"
Louisville	"	"	"
Bridgeport-New	"	"	"
Haven-Waterbury	"	"	"
Tacoma	"	"	"
		Akron, O. ¹	"
		Albany	"
		Indianapolis	"
		Providence	"
		Scranton-Wilkes B.	"
		Syracuse	"
		Tampa-St. Pete.	"
		Winston-Salem-HP-G.	"
		Little Rock, Ark.	"
		Youngstown ²	"

¹ WTAM—Cleveland delivers primary service in Akron.² WTAM—Cleveland delivers primary service in Youngstown.

[fol. 408]

TABLE 3

Cities with 3 Stations

(Absence of ditto denotes transference to Tables 1 or 2)

1038	1939	1940	1941
Birmingham	"	"	"
Cleveland	"	"	"
Dayton ¹	"	"	"
Des Moines	"	"	"
Houston	"	"	"
Miami	"	"	"
Nashville	"	"	"
Norfolk ²	"	"	"
Rochester, N. Y.	"	"	"
Shreveport	"	"	"
Spokane	"	"	"
Little Rock	"	"	"
Akron ³	"	"	"
Albany	"	"	"
Providence	"	"	"
Scranton	"	"	"
Denver	"	"	"
Bridgeport	"	"	"
Tacoma	"	"	"
Beaumont-Port Arthur	"	"	"
Duluth-Superior	"	"	"
Fresno	"	"	"
Jacksonville	"	"	"
Suffolk, Va.	"	"	"
Toledo ⁴	"	"	"
Tulsa	"	"	"
Wilmington, Del. ⁵	"	"	"
Springfield, Mass.	"	"	"
Syracuse	"	"	"
Tampa-St. Petersburg	"	"	"
Winston-Salem, N. C.	"	"	"
Chattanooga	"	"	"
Grand Rapids	"	"	"
Knoxville	"	"	"
Omaha ⁶	"	"	"
Phoenix	"	"	"
Richmond	"	"	"
San Diego	"	"	"
Wichita	"	"	"
Everett	"	"	"
Augusta, Ga.	"	"	"
Worcester ⁷	"	"	"
Brownsville, Tex.	"	"	"
Charlotte, N. C.	"	"	"
San Juan, P. R.	"	"	"
Wheeling ⁸	"	"	"

¹ WLW—Cincinnati delivers primary service in Dayton.² WRVA—Richmond delivers primary service in Norfolk.³ WTAM—Cleveland delivers primary service in Akron.⁴ KFAB—Lincoln delivers primary service in Omaha.⁵ WJR—Detroit delivers primary service in Toledo.⁶ WCAU—Philadelphia delivers primary service in Wilmington.⁷ WBZ—Boston delivers primary service in Worcester.⁸ KDKA—Pittsburgh delivers primary service in Wheeling.

NILES TRAMMELL

Subscribed and sworn to before me
this 10th day of January, 1942.

DOMINICK J. MAGGIPINTO

Notary Public—Richmond County

N. Y. Co. Reg. No. 3M805, Clk's No. 1275

Commission Expires March 30, 1943

[SEAL]

[fol. 409] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF EDGAR KOBAK

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

EDGAR KOBAK, being duly sworn, deposes and says:

For approximately the past year and a half I have been Vice President of the National Broadcasting Company, Inc., in charge of sales on the Blue Network. This affidavit is submitted to correct statements made in the affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Inc., Intervenor, with respect to the Ballantine program and the March-of-Time program.

The Weber affidavit unfairly ascribes practically every piece of business which Mutual has lost to the operation of NBC affiliation contracts. The theory seems to be that otherwise Mutual would have all the business. That is not the fact. The prestige of the networks of the National Broadcasting Company and the audiences attracted by its programs are such that advertisers throughout the years [fol. 410] have shown a decided preference for the use of its facilities. The following recital of the two accounts gone into in great detail by Mr. Weber, is to show that in each instance Mutual did not get or keep the business solely and only because the advertisers preferred the NBC networks.

The Weber affidavit is designed to give the further impression that Mutual is in a precarious position, by stressing the fear it has of losing other accounts. The fact of the matter is, of course, that Mutual has a great amount of other business not referred to in the Weber affidavit and currently represents itself as follows:

"In 1940 Mutual billing increased at the fastest rate of any network since 1935. For the *sixth straight* year the curve of this network success was a steady upward line."

On January 8, 1942 Mutual advertised itself as having a 53% gain in total billings in 1941 over 1940.

The Ballantine Program

NBC's policies as to the acceptance or rejection of programs are constantly being revised. This necessarily is so because changing public tastes and standards require that in a dynamic business the program policies keep pace with such changes. Changes in program policies are not restricted to the commercial field but extend into the sustaining field. So in the matter of beer accounts, NBC did have a policy against such advertising. Before the J. Walter Thompson Company, the advertising agency representing Ballantine & Sons, ever went to the Mutual Broadcasting System, they inquired of NBC whether it would accept beer advertising. NBC at that time informed the J. Walter Thompson agency that it would not. Thereupon, the agency asked NBC to let them know if at any time thereafter NBC changed its policy in regard to beer.

The Ballantine account was not the only beer account that besought NBC to change its policy. These requests caused the NBC makers of policy to review the policy in this regard. Several months thereafter, in fact about the end of October, 1941, NBC decided that it would accept [fol. 411] beer accounts on its Blue network. In compliance with the request of the agency, made months before, NBC informed it of this change. Thereupon the agency stated that it would much prefer to be on the NBC Blue network to the Mutual network and had gone to Mutual only because at the time NBC would not accept beer advertising. The Ballantine program thereafter came to the Blue network for the reason that the Blue network was preferable to it over the Mutual network and for no other reason.

The complete answer to Mr. Weber's plaint in this matter that Mutual lost this business because of NBC's option time arrangements is found in the fact that it was necessary for the Ballantine Company to accept delayed broadcasts on seven NBC Blue stations. Even after the scheduling of the Canada Dry program on the NBC Blue, to which Weber refers, Mutual had delayed broadcasts on the Ballantine program on only ten stations. It cannot seriously be contended that the difference between delayed broadcasts on ten as distinguished from seven stations caused this account to shift its advertising.

The March of Time Program

This program is one of the most interesting news dramatization programs on the air. Mr. Weber fails to point out that it had been on the Blue Network of NBC for a year and a half until the owners of Time, Inc., discontinued radio programs in 1939. When in 1941 Time, Inc., decided to resume its radio program, quite naturally it approached the Blue Network of NBC before it approached Mutual.

NBC had, meanwhile, adopted a policy against the dramatization of war news. Time, Inc. requested NBC to reconsider. While the reconsideration was under way, Time, Inc. negotiated with Mutual. When NBC decided to change its policy in respect of such dramatization, it so informed Time, Inc. and accepted the March of Time program.

NBC did not in any way intimate to Young & Rubicam, the advertising agency for Time, Inc. or to Time, Inc. itself that NBC would attempt to block the scheduling of the March of Time program on the Mutual network. Time, Inc. [fol. 412] understandably preferred the Blue Network because among other favorable factors, its program had been broadcast over that network before and it knew what service it could expect from the Blue Network.

The Clark Candy Company program, to which Mr. Weber refers, was scheduled for Thursday night from 8 to 8:30 p. m. on the Blue network before the March of Time program was accepted and without regard to that program. After NBC had accepted the March of Time program, Young & Rubicam asked NBC to request the Clark Candy Company to change its time to 8:30 to 9 p. m. on Thursday nights, following the March of Time program. This request was made because the later period was sufficiently suitable for the Clark Company's desires, whereas it was unsuitable to Young & Rubicam because that agency had another program in the earlier period on another network and did not wish to create competition between its own two programs.

It would be entirely possible to go through each of the other programs referred to by Mr. Weber in his affidavit and show that in each and every instance the reason for the preference for the networks of NBC was the opinion of the advertisers that they are the superior networks and have affiliated with them stations whose good will built up over the years is also of the highest.

The competition for business between all the networks is keen. If NBC's option time arrangements had the effect which Mr. Weber attempts to ascribe to them, it would seem impossible for Mutual ever to get a program so long as there was time available on the NBC Blue. Yet Mutual advertises itself as the fastest growing network.

Edgar Kobak.

Subscribed and sworn to before me this 9th day of January, 1942. Dominick J. Maggipinto, Notary Public, Richmond County. N. Y. Co. Reg. No. 3M805, Clk's No. 1275. Commission Expires March 30, 1943.

[fol. 413] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTIONS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavits of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and of William P. Massing, verified the 5th day of November, 1941, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action either under any special statutory provisions such as are referred to in the preamble to the complaint, or under the general equity jurisdiction of the Court, or otherwise.
2. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, this is a suit against the United States and the United States has not consented to be sued.
3. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special

statutory authorization, this action was improperly brought in the Southern District of New York and cannot properly be brought in the Southern District of New York because [fol. 414] the defendants were not and are not inhabitants of the Southern District of New York.

4. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, the service on the defendants was invalid because the summons herein was served in the District of Columbia, to which the process of this Court does not extend in this action, and the defendants were not served within the Southern District of New York or within the State of New York.

5. The complaint fails to state a claim upon which relief can be granted.

6. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavits submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Dated: Washington, D. C., November 7, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. (S.) Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

[fol. 415] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR.

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's

proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionnaire [fol. 416] from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

(c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Broadcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of the Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 ex-

hibits. The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940, [fol. 417] oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regulations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 on order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective

date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties. Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was had before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Commissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

[fol. 419] "If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the

Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2: A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

[fol. 420] 3. One of the grounds on which plaintiffs contend that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid is that the regulations are "arbitrary and capricious and contrary to the public interest." Affiant submits that Exhibit A is relevant on that issue sought to be raised and that it shows that the regulations are not arbitrary or capricious but that they are in the public interest, and that there is no genuine issue as to any material fact.

(S:) Telford Taylor.

Subscribed and sworn to before me this 5th day of November, 1941. (S:) Pansy E. Wiltshire, Notary Public, D. C. My commission expires October 31, 1945. (Seal.)

[fol. 421] IN DISTRICT COURT OF UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF WILLIAM P. MASSING

DISTRICT OF COLUMBIA, SS:

WILLIAM P. MASSING, being duly sworn, says:

1. I am Acting Secretary of Federal Communications Commission and official custodian of the records of said Commission.
2. I make this affidavit for the purpose of controverting the jurisdiction of the Court insofar as this action is brought under the general equity jurisdiction of the Court.
3. On or about October 31, 1941, an attempt was made to serve what purported to be a summons in the above-entitled action on Federal Communications Commission by leaving a copy thereof at the office of the Secretary of said Commission in the New Post Office Building, Washington, D. C., and no service of a summons in said action has been made on said Commission within the State of New York or within the Southern District of New York, or on any of the members thereof within said State or Southern District of New York or elsewhere.
4. Said Commission and the members thereof are not inhabitants of the State of New York or of the Southern District of New York.

(S.) William P. Massing.

Subscribed and sworn to before me this 5th day of November, 1941. (S.) Pansy E. Wiltshire, Notary Public, D. C. My commission Expires October 31, 1945. (Seal.)

[fol. 422] **Plaintiffs' Affidavits in Opposition to Motions to Dismiss Complaint or for Summary Judgment**

[fol. 423] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SIDNEY N. STROTZ, NBC Vice President in Charge of Programs

UNITED STATES OF AMERICA,

Southern District of New York,
City, County and State of New York, ss.:

SIDNEY N. STROTZ, being duly sworn, deposes and says:

1. I am employed by National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs in this action, as Vice President in Charge of Programs. In 1933 I was first employed by NBC as Manager of the Program and Artists Service Departments of its Central Division with headquarters in Chicago. In January, 1939, I was appointed Manager of the NBC Central Division and in December, 1939, I became a Vice President of NBC in charge of that Division. I have been in charge of NBC's programs since October 8, 1940.

[fol. 424] 2. In the course of my employment with NBC since 1933, I have become thoroughly familiar with the programs broadcast by NBC, including those originated and developed by NBC itself and those broadcast by NBC for others.

3. In the preparation of this affidavit, my recollection has been refreshed by compilations of data with respect to the programs broadcast by NBC taken from the NBC records and prepared by the NBC statistical staff.

NBC News Services

4. The greatest achievement of network broadcasting is its service as a means of mass communication on a nationwide and instantaneous basis. This is a notable contribution in time of peace and an imperative necessity in time of war. NBC recognizes, especially in these times of world crisis, that no other phase of its service to the public is more important, that news impartially presented is fundamental and basic to our democratic system.

5. News reports as we know them today did not exist on NBC networks at the time of its organization in 1926. The need was soon recognized and by 1932 an average of five hours weekly was devoted to news reports and news summaries. The following table indicates the increasing importance which NBC has placed on this portion of its broadcasting service.

Year	Number of News Program Hours	News as Percent of Total Program Hours
1926		
1932	254	2.0
1936	705	3.6
1940	1436	8.0
1941 (estimate)	1703	8.8

6. Eloquent testimony of the importance placed on news broadcasts comes daily by letters from families in remote [fol. 425] areas and isolated places. There are vast stretches of this country containing millions in population entirely dependent on the radio news services for their information as to current events. In times such as these, the radio newscaster is listened to regularly and faithfully. In the great rural districts thousands of farm families have as practically their only contact with the outside world for months at a time the news messages coming through the loud speaker. The whole world is brought to their door via live broadcasts from the furthestmost cities of the globe. The craving for news of what is happening in this country and throughout the world is found among all types of people, regardless of economic status, age, education, or political inclination, and they depend on radio as a principal source of news.

7. In its dissemination of news NBC makes use of the services of established news-gathering agencies which are equally available to the press, including AP, UP and INS. These news summaries are scheduled at frequent intervals throughout the day and evening (schedule attached hereto as Exhibit "A") and, almost without exception, presented just as they came from the news tickers without change or addition.

8. Numerous commentators are heard on NBC networks usually with expanded resumés and interpretations of lat-

est developments. To keep the nation informed as to what is going on in other parts of the world NBC maintains an extensive staff of overseas reporters whose daily accounts are shortwaved and rebroadcast for U. S. listeners.

Up to the participation of the United States in the war, NBC maintained its own correspondents in each of the following 26 foreign cities:

Brazzaville, Fr. French
Africa
Juneau, Alaska
Buenos Aires, Argentina
Sydney, Australia
Batavia, Java

Reykjavik, Iceland
Rome, Italy
Tokio, Japan
Manila, P. I.
Mexico City, Mexico

[fol. 426]

Shanghai, China
Chungking, China
Bogota, Colombia
Cairo, Egypt
London, England
Helsinki, Finland
Vichy, France
Berlin, Germany

Panama City, Panama
San Juan, Porto Rico
Kouibyshev, Russia
Singapore
Stockholm, Sweden
Berne, Switzerland
Ankara, Turkey
Caracas, Venezuela

Since the outbreak of war, of course, NBC's correspondents in enemy countries have not been permitted to broadcast or transmit news.

9. Supplementing these regular news sources NBC has established its own listening post where a twenty-four hour daily vigil is kept by a corps of specially trained linguists whose duty it is to listen to foreign short wave broadcasts. Their reports are flashed to NBC's News Room and made available to press associations throughout the country.

10. The broadcast accounts of events as they are actually happening is a form of news reporting unique to network radio. NBC has brought on-the-scene word pictures wherever world news events were taking place and as history was being made. When Japan abruptly terminated her negotiations with our government by a devastating bombing raid on our Pacific Base at Pearl Harbor, December 7, 1941, the news was flashed by radio to the NBC listening audience within thirty minutes. Throughout the day and night, programs were interrupted with reports of latest

developments and interpretations of what was happening. One the following day the momentous message of President Roosevelt informed the world by radio of our country's declaration of war against Japan. The broadcasts in connection with the opening of hostilities with Japan exemplify the type of public service NBC stands prepared to render twenty-four hours a day. Exhibit B annexed hereto contains examples of outstanding news events of the type broadcast by NBC.

[fol. 427] NBC Public Discussion Programs

11. The fact that radio in this country is self supporting through the sale of time to advertisers means, among other things, that NBC can thereby provide the opportunity for the free expression of opinion on questions of national interest. This distinguishes the American system from that of most other nations. Regardless of the administration in office, the company has always made its facilities available to the government for the expression of its views and has given similar opportunities to the opposition to voice its opinions in order that a fair presentation of public questions can be made.

12. Officials of our government, the President, Cabinet officers, members of Congress, State representatives, leaders of the educational, social, and religious forces, all are afforded the facilities of NBC's nationwide organization to express their views and keep the public informed. Increasing use of network broadcasting has been made by the President, the familiar fireside chats making it possible for the Chief Executive to talk directly into the homes of the nation. Representatives of all governmental departments and agencies have been granted NBC time to discuss at first hand the developments within their own fields of responsibility. The following list is indicative of the use of time on NBC in 1941 by officials of the Federal government:

	Number of Radio Speeches
President Roosevelt	21
Vice President and Cabinet Members	106
Congressmen	215

13. In the direction of its efforts toward the enlightenment of the public on all important governmental, political,

and economic questions, NBC has provided for the open discussion of all sides of controversial issues. As long ago as 1932 the National Radio Forum was established by NBC [fol. 428] in cooperation with the Washington Evening Star. The "University of Chicago Round Table Discussions" have been a feature broadcast on NBC since 1933 presenting in an informal, unrehearsed manner, opposing views of questions of the day. During its six years on NBC "America's Town Meeting of the Air" has become one of the most unique and outstanding forum programs on the air. It is NBC's policy and its earnest endeavor to grant equal facilities to groups and individuals in the presentation of conflicting opinions on such controversial issues as the Supreme Court case, the Lend-Lease Bill, the Neutrality Act, etc. Attached as Exhibit "C" is a list of the forum and discussion programs on NBC networks in 1941.

14. During 1940 NBC has made available 1,220 program hours or 9.6% of all its sustaining program time for broadcasts in behalf of various organized groups representing business, charity, education, government, labor, etc. This imposing list (copy of which is attached) indicates that three hundred and fifty two separate organizations were provided time as follows:

Organization	Number of Organizations	Total Program Time Hours Mins.
Business	44	53:29
Charity, etc.	23	32:21
Civic	30	47:38
Cultural	46	201:02
Educational	70	144:12
Farm	3	248:40
Governmental	24	97:13
Labor	11	8:21
Patriotic	17	16:47
Political	44	131:54
Religious	23	204:20
Scientific	17	34:10
Total	352	1220:07

These organizations are identified in Exhibit "D", attached hereto.

[fol. 429] 15. NBC's concept of its responsibility in the field of public service extends to a wide variety of program types; in terms of program time these broadcasts account for 35% of the total program day. In addition to news and special events broadcasts, talks, forum discussions, etc., the field of NBC activity includes presentation of the world's finest music and drama; the cooperation with the Government Parent Teacher and Women's organizations in the presentation of programs of special interest to women and children. Opportunity is granted the three major religious faiths for programs on a regular weekly schedule. Six days each week the NBC in cooperation with the Department of Agriculture presents the National Farm and Home Hour, a program dedicated to the service of American agriculture, now in its thirteenth consecutive year. A list of outstanding NBC public service programs is attached hereto as Exhibit E.

16. NBC is proud of its record of fifteen years of public service. In the crisis of the war which is upon us, NBC stands ready to devote its facilities to whatever use will best serve the interests of national defense and our ultimate victory. NBC hopes to continue to operate on the high plane of public responsibility which it has always maintained toward the government and the people.

Sidney N. Strotz.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. (Seal.)

Queens Co. No. 2625, Reg. No. 6868,
Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369.
Commission Expires March 30, 1943.

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EXHIBIT "A" TO AFFIDAVIT

Regularly Scheduled News Broadcasts on NBC Red & Blue Networks as of
December 5, 1941

Red Network

Time (Est)	Program	Schedule
8:00- 8:05 AM	News Summary	Sunday
8:00- 8:15 AM	European News Roundup	Mon thru Sat
8:00- 8:15 AM	Clifton M. Utley (Skelly Oil Co.)	Mon thru Fri
8:45- 9:00 AM	News Summary	Mon thru Sat
9:00- 9:15 AM	European News Roundup	Sunday
11:00-11:05 AM	News Summary	Sunday
1:00- 1:15 PM	Upton Close	Sunday
1:45- 1:50 PM	News Summary	Mon thru Fri
3:15- 3:30 PM	H. V. Kaltenborn	Sunday
6:25- 6:30 PM	News Summary	Mon thru Sat
7:15- 7:30 PM	News of the World (Miles Labs.)	Mon thru Fri
7:45- 8:00 PM	Kaltenborn Edits the News (Pure Oil)	Tues-Thurs-Sat
11:00-11:15 PM	News Summary	Daily
11:15-11:30 PM	Story Behind the Headlines	Sunday
12:00-12:05 AM	News Summary	Daily
12:55- 1:00 AM	News Summary	Daily

[fol. 431]

Blue Network

Time (Est)	Program	Schedule
8:00- 8:05 AM	News Summary	Sunday
8:00- 8:15 AM	European News Roundup	Mon thru Sat
8:55- 9:00 AM	News Summary	Mon thru Sat
9:00- 9:15 AM	European News Roundup	Sunday
10:15-10:30 AM	Helen Hielt	Mon thru Fri
11:00-11:05 AM	News Summary	Sunday
1:45- 1:50 PM	News Summary	Mon thru Fri
4:45- 5:00 PM	News Summary	Mon thru Fri
6:30- 6:45 PM	Pearson and Allen (Health aids Inc.)	Sunday
6:45- 7:00 PM	Over Our Coffee Cups (Pan American Coffee Bureau)	Sunday
6:45- 7:00 PM	Lowell Thomas (Sun Oil Company)	Mon thru Fri
7:00- 7:30 PM	European News Roundup	Sunday
7:45- 8:00 PM	Upton Close	Wednesday
7:45- 8:00 PM	Edward Tomlinson	Saturday
8:00- 8:15 PM	Edward Tomlinson	Friday
8:00- 8:30 PM	March of Time (Time Inc.)	Thursday
9:00- 9:15 PM	Walter Winchell (Jergens Company)	Sunday
9:00- 9:15 PM	News Here and Abroad (Trimount Clothing Co.)	Thursday
9:55-10:00 PM	Smith Brothers News (Smith Brothers)	Friday
10:30-10:45 PM	Ahead of the Headlines (Weekly Publications)	Wednesday
10:30-10:45 PM	News Here and Abroad	Mon-Tues-Fri
11:00-11:05 PM	News Summary	Sunday
12:00-12:05 AM	News Summary	Daily
12:55- 1:00 AM	News Summary	Daily
1:00- 1:05 AM	Baukhage (National Farm and Home Hour)	Mon thru Fri

[fol. 432]

EXHIBIT "B" TO AFFIDAVIT

Examples of Outstanding News Events Broadcast by NBC Networks

- 1927 (August 7) Dedication of the International Peace Bridge at Niagara Falls to the continuation of peaceful international relations.
- 1928 (June 12-15) Complete coverage of Republican National Convention in Kansas City.
- 1928 (June 26-29) Complete coverage of Democratic National Convention in Houston Texas.
- 1928 (December 10) Opening of International Conference of American States in Pan American Building.
- 1929 (March 4) Inauguration Ceremonies of President Hoover and Vice President Curtis. For the first time in history, microphones were placed in the Senate Chambers where the Vice President was inaugurated.
- 1930 (January 21) Opening session of the London Naval Parley; Speakers—King George V, Ramsey McDonald, Secretary Stimson, Henri Tardieu, Dino Grandi.
- 1930 (October 30) London England—The Prince of Wales address before the League of Nations dinner to delegates at the British Imperial Conference.
- 1931 (September) Geneva, Switzerland—Complete coverage of the Geneva Peace Conference.
- 1931 (June and July) Pick-ups from around the world covering the flight of Post and Gatty.
- 1932 (January 20) Mukden Manchuria—General Shigeru Honjo, leader of Japanese Military Forces, and Floyd Gibbons broadcasting from the battlefields of Manchuria.
- 1932 (January 31-March 13) Geneva Switzerland—World Disarmament Conference—Official opening address and forty talks by William Hard.
- 1932 (June 27-July 2) Complete coverage of Democratic National Convention held in Chicago, Illinois.
- 1932 (June 14-June 16) Complete coverage of the Republican National Convention held in Chicago, Illinois.
- 1932 (October 15) Rome Italy—Address by Guglielmo Marconi, Marking the Tenth Anniversary of Fascism.
- [fol. 433]
- 1933 (May 15) Berlin Germany—Address of Chancellor Adolph Hitler delivered before the German Reichstag announcing Germany's foreign policy under the Nazi regime.
- 1933 (June 12) London England—Opening of the World Economic and Monetary Conference.
- 1933 (March 12) First Fireside talk by President Roosevelt.
- 1934 (January 3) Ceremonies of the opening of the second session of the 73rd Congress.
- 1934 (May 31) Complete description of President Roosevelt's review of the United States Battle Fleet.
- 1935 (September 13) Talk by Haile Selassie from Addis Ababa in connection with the Ethiopian-Italian War.

EXHIBIT "B" TO AFFIDAVIT—Continued

- 1935 (August 20-28) Most extensive field broadcast hookup in radio history of the Army Maneuvers at Pine Camp, New York.
- 1936 (Nov. 6-Dec. 23) Pan American Peace Conference held in South America and attended by various dignitaries including President Roosevelt.
- 1936 (June 9-12) Complete coverage of the Republican National Convention held in Cleveland.
- 1936 (June 23-27) Complete coverage of the Democratic National Convention held in Philadelphia.
- 1937 (September 11) Broadcast by Madame Chiang Kai-Shek on the war situation in China.
- 1937 (May 12) Coronation of King George VI and Queen Elizabeth of England.
- 1938 (March 12) Complete coverage of the absorption of Austria by Germany, including such broadcasts as Hitler's first entrance into Austria at Linz.
- 1938 (September 16) Description of the arrival of Prime Minister Chamberlain in London after his first meeting with Hitler.
- 1938 (September 29) From Munich, Germany, first official reading of the Four Power Pact.
- 1939 (February 9) Tolling of Chimes and description followed by the announcement of the passing of Pope Pius XI.
- 1939 (March 2) From Vatican City—announcement of Election of Pope Pius XII.
- [fol. 434]
- 1939 (September 23-27) Broadcasts in connection with the Pan American Peace Conference held in Panama City.
- 1939 (March 23) From Memel, arrival of Hitler—description of scene followed by talk of Herr Hitler.
- 1939 (August 31) Berlin Germany—Spokesman for German Press gave the sixteen points in Hitler's proposal for settlement of Danzig and Polish corridor (first word of Hitler's official demands upon Poland).
- 1939 (September 3) London, England—Prime Minister Chamberlain from Ten Downing Street declared England at war with Germany. Paris, France—Premier Deladier declaration of war.
- 1939 (December 17) Montevideo, Uruguay—First actual description of a scuttling of a ship in war time. The German war ship Graf Spee was scuttled and sunk.
- 1940 (June 10) Rome, Italy—Premier Mussolini declared war on the Allies.
- 1940 (June 21-22) Compeigne Forest, France—description of Armistice proceedings between Germany and France.
- 1941 (January 20) Complete description of the Third Inauguration of Franklin D. Roosevelt as President of the United States.
- 1941 (August 14) London, England—Major Clement J. Atlee read the joint declaration—eight point resolution established by the Roosevelt-Churchill Atlantic meeting.
- 1941 (December 8) President Roosevelt's joint message to Congress asking for a declaration of war on Japan.

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EXHIBIT "C"

Forum and Discussion Programs on NBC Networks in 1941

Program	Network	Time
National Radio Forum (since June 1933)..... Discussions of vital problems facing the American people by representatives of our government and authoritative speakers.	Blue	Monday 9:00-9:30 PM
America's Town Meeting of the Air (since May 1935). Forum broadcast direct from the floor of Town Hall, New York, presenting leaders in various fields of thought in American political and economic life in discussions of current problems under the auspices of Town Hall, Inc.	Blue	Thursday 9:15-10:15 PM
University of Chicago Round Table (since Oct. 1933). Non-partisan discussions of current topics of political, economic, social and international interest by members of the University of Chicago faculty, produced in cooperation with the University Broadcasting Council.	Red	Sunday 2:30-3:00 PM
Foreign Policy Association (1929-1933) (since Oct. 1939). Authoritative speakers on our international relations.	Blue	Sunday 12:00-12:15 PM
Wake Up America (since Sept. 1941)..... Forum program produced in cooperation with the American Economic Foundation and presenting two outstanding speakers discussing important economic issues.	Blue	Sunday 2:00-3:00 PM
Republican Club Saturday Discussions (since Jan. 1938)..... Discussions on current economic, social and international problems facing America by leading Republican figures.	Red	Saturday 1:30-2:00 PM
American Education Forum (Oct. 1935-April 1941). Discussion of controversial issues in education by leading professors and arranged by the American Education Committee.	Blue	Saturday 12:00-12:25 PM

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EXHIBIT "D" TO AFFIDAVIT

NBC Network Program Time in Behalf of Various Organizations
Year 1940

During the year 1940 NBC supplied 12,405 hours of sustaining program service to the Red, Blue, Pacific Red and Pacific Blue networks. Of this amount, this report reveals that 1,220 hours or 9.6 percent of the sustaining total were broadcast in behalf of business, charitable, civic, educational, farm, government, labor, patriotic, political, religious and scientific organizations.

Organization	Number of Organizations	Total Time Hrs.:Min.	% of Total Organization Time
Business.....	44	53:39	4.4
Charity, etc.....	23	32:21	2.6
Civic.....	30	47:38	3.9
Cultural.....	46	201:02	16.5
Educational.....	70	144:12	11.8
Farm.....	3	248:40	20.4
Governmental.....	24	97:13	8.0
Labor.....	11	8:21	.7
Patriotic.....	17	16:47	1.4
Political.....	44	131:54	10.8
Religious.....	23	204:20	16.8
Scientific.....	17	34:10	2.8
Total.....	352	1,220:07	100.00

Research Division

Sept. 23, 1941

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Alphabetical List of Organizations Using NBC Networks 1940

Organization	Classification	Total Time Hr. Min.
Academy of Political Science	Educational	1 00
Advanced School of Education (see Columbia University)		
Advertising Club of New York	Business	1 26
Advertising Women of New York	Business	30
Agricultural Marketing Service (see Dept. of Agriculture)		
Air Youth of America	Educational	1 45
Amalgamated Clothing Workers (see Congress of Industrial Organizations)		
American First Committee	Political	15
American Academy of Ophthalmology & Otolaryngology	Scientific	15
American Association for Adult Education Inc.	Educational	18 30
American Association for the Advancement of Science	Scientific	2 30
American Association for Health, Physical Education & Recreation (see Natl. Education Association of U. S.)		
American Association of Museums	Cultural	4 00
American Association of School Administrators	Educational	42
American Bar Association	Business	14
American Civil Liberties Union	Political	45
American Coalition of Patriotic Societies	Patriotic	27
American College Publicity Association	Educational	30
American College of Surgeons	Scientific	12
American Council on Education	Civic	1 30
American Defense Society	Political	30
American Design Award (see Lord & Taylor)		
American Dental Association	Scientific	40
American Education Committee	Educational	12 05
American Farm Bureau Federation	Farm	30
American Federation of Labor	Labor	4 15
American Good Government Society	Patriotic	45
American Historical Association	Educational	8 45
American Hospital Association	Charitable	15
American Jewish Congress	Religious	30
American Jewish Joint Distribution Committee	Charitable	30
American Labor Party	Political	39
American Law Institute	Civic	3 15
American Legion	Patriotic	7 08
American Legion Auxiliary	Charitable	15
American Library Association	Educational	1 15
American Medical Association	Scientific	13 15
American Museum of Natural History	Scientific	15
American Museum of Natural History in N. Y. (see Museum of Science & Industry in Chi.)		

[fol. 438]

American Pharmaceutical Association	Business	14
American Philosophical Society	Educational	34
American Red Cross	Charitable	11 38
American Retail Federation	Business	15
American Road Builders Association	Business	15
American Scientific Congress (see Pan-American Union)		
American Society for the Control of Cancer	Charitable	30
American Society of International Law	Business	30
American Society for the Prevention of Cruelty to Animals	Civic	30
America's Town Meeting of the Air (see Town Hall, Inc.)		
American Vocational Guidance Society	Educational	15
American Woman's Association	Civic	25

Organization	Classification	Total Time Hr. Min.
American Youth Commission (see American Council on Education)		
American Youth Congress	Political	1 54
Animal Looks at the World (see American Museum of Natural History)		
Argentine Meteorological Expedition	Scientific	10
Army Information Service (see Dept. of War)		
Army Maneuvers (see Dept. of War)		
Art for Your Sake (see National Art Society)		
Art of Living (see Federal Council of Churches of Christ in America)		
Ashland Ohio Symphony Orchestra	Cultural	30
Book Week Committee Inc.	Cultural	1 00
Boy's Club	Civic	15
Boy Scouts	Civic	1 00
British War Relief Society	Charitable	30
Buhl Planetarium	Scientific	15
California Alumni Association University Explorers	Scientific	30
California Institute of Technology (see Stanford University)		
Call to Youth (see Federal Council of Churches of Christ in America) (see Natl. Council of Catholic Women) (see Union of American Hebrew Congregation)		
Calling All Stamp Collectors (see Natl. Federation of Stamp Clubs)		
[fol. 439]		
Catholic Charities	Charitable	45
Catholic Hour (see Natl. Council of Catholic Men)		
Central City Play Festival	Cultural	1 00
Chautauqua	Cultural	7 00
Chicago Ban Association	Business	30
Chicago Better Business Bureau	Business	30
Chicago City Opera	Cultural	1 00
Chicago Motor Club	Business	15
Chicago Philharmonic	Cultural	1 30
Chicago Symphony	Cultural	3 43
Child Grows Up (see Dept. of Labor)		
Childrens Book Week (see Book Week Committee Inc.)		
Children's Crusade for Children	Charitable	1 40
China Aid Council	Charitable	30
China Emergency Relief Committee	Charitable	15
Christian Foreign Service Convocation (see Foreign Missions Conference of North America)		
Christian Science Committee on Publications	Religious	45
Cincinnati Bach Society	Cultural	1 00
Cincinnati Summer Opera Association	Cultural	1 40
Cincinnati Symphony	Cultural	1 40
Citizens Committee of 1,000	Political	15
Citizenship Educational Service Inc.	Patriotic	05
Civil Aeronautics Authority	Governmental	15
Civil Service Commission	Governmental	13
Civilian Conservation Corps	Governmental	27
Cleveland Symphony Orchestra	Cultural	30
Coast Guard (see Dept. of Treasury)		
Columbia University	Educational	1 03
Committee to Defend America by Aiding the Allies	Political	54
Committee to Defend America by Keeping out of War	Political	13
Communist Party of the U. S.	Political	30

Organization	Classification	Total Time Hr. Min.
Community Chest & Councils Inc.	Charitable	1 00
Congress of Industrial Organizations	Labor	2 56
Consumers Council (see Dept. of Interior)		
Coolidge, (Elizabeth Sprague) Foundation	Cultural	2 30
Coronado Exposition Commission	Governmental	2 00
Council Against Intolerance in America	Educational	15
Curtis Institute of Music	Cultural	3 30
Daughters of American Revolution	Patriotic	35
Democratic National Committee	Political	41 42
Democratic State Committee	Political	1 00
[fol. 440]		
Department of Agriculture	Farm & Governmental	268 50
Department of Interior (see General Federation of Women's Clubs)	Governmental	15
Department of Justice	Governmental	3 00
Department of Labor	Governmental	13 55
Department of the Navy	Governmental	2 51
Department of State	Governmental	15
Department of Treasury	Governmental	45
Department of War	Governmental	4 13
Detroit Symphony	Cultural	30
Doctors at Work (see American Medical Association)		
Douglas County of Nebraska Republican Women's Club	Political	43
Drug Topics	Business	25
Eastman School of Music	Cultural	11 30
Economic Club of New York	Business	1 01
El Paso County Ministerial Alliance	Religious	30
Engineering Society of Western Pennsylvania	Business	30
English Speaking Lodges of the Croation Fraternal Union of America	Patriotic	15
English Speaking Union of the United States	Educational	15
Fahnestock Expedition	Scientific	43
Farm & Home Hour (see U. S. Dept. of Agriculture) (see Co-operating Governmental Agencies)		
Federal Bar Association	Business	27
Federal Communications Commission	Governmental	43
Federal Council of Churches of Christ in America	Religious	134 45
Federal Works Agency	Governmental	46
Federation of Young Republican Groups of Greater N. Y.	Political	15
Federation for Support of Jewish Philanthropic Societies	Charitable	31
Field Museum of Natural History in Chicago	Scientific	7 00
First Aid Week (see National Association of Retail Druggists)		
First General International Conference of the Methodist Church	Religious	30
Foreign Missions Conference of North America	Charitable	30
Foreign Policy Association	Educational	12 00
Friday Night Army Show (see Dept. of War)		
Friends of Library (see American Library Association)		
Front Page Ball (see New York Newspaper Women's Club)		
Gallant American Women (see U. S. Office of Education)		
General Electric Research Laboratory	Business	45

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Organization	Classification	Total Time	
		Hr.	Min.
General Federation of Women's Clubs	Civic	20	00
General Motors	Business		30
Geographical Society of America	Scientific		15
Girl Reserve Secretaries (see Y. W. C. A.)			
Girl Scouts	Civic		30
Goddard College	Educational		15
Gold Star Mothers	Patriotic		30
Golden Rule Foundation	Civic		30
Governors Conference	Civic		15
Government Committee for National Art Week (see Federal Works Agency)			
Grand Jury Association of New York County	Civic		30
Greater New York Federation of Churches	Religious	1	00
Greater New York Fund	Charitable	5	00
Greater New York Safety Council	Civil		05
4-h Club	Farm		25
Hadassah	Religious		25
Highlights of the Bible (see Federal Council of Churches of Christ in America)			
Hi-Y Congress (see Y. M. C. A.)			
Howard University	Educational		30
How Do You Know (see Field Museum of Natural History in Chicago)			
I Am An American Citizenship Foundation	Patriotic		31
"I Am an American"—series (see Dept. of Justice & Dept. of Labor)			
Illinois Manufacturing Association	Business		29
Indiana Editorial Association	Political		30
Indiana Republican Organization	Political		30
Institute of Public Affairs	Civic		29
International Association Printing House Craftsmen	Labor		30
International Brotherhood of Teamsters, Chauffeurs, Stablemen, & Helpers of America (see American Federation of Labor)			
International Federation of Business & Professional Women	Civic		30
International Petroleum Exposition	Business		30
International Police Chiefs Association	Civic		30
Jewish Education Association	Religious		30
Jewish Forum	Charitable		26
Johnson County Missouri Republican Committee	Political		29
Kansas City Philharmonic	Cultural	1	00
Kansas Day Republican Club	Political		30

[fol. 442]

Keep American Out of War Congress	Political		45
Kiwanis International	Civic		30
Knights of Columbus	Religious		30
Laymen's Crusade for Christian Education of the International Council of Religious Education	Religious		15
Library of Congress	Governmental	14	45
Lord & Taylor	Business		30
Los Angeles Philharmonic	Cultural	1	22
Man and the World (see Museum of Science & Industry in Chicago)			
Maritime Day (see National Maritime League)			

Organization	Classification	Total Time Hr. Min.
Mary Miller Vocational High School	Cultural	30
Medical Society of the State of N. Y.	Scientific	28
"Medicine in the News" (see American Medical Association)		
Merchants Association of N. Y.	Business	15
Message of Israel (see United Jewish Laymen's Committee)		
Metropolitan Junior Achievement Inc.	Civic	15
Metropolitan Opera Association	Cultural	52 57
Metropolitan Opera Guild	Cultural	1 15
Midwestern Music Camp	Cultural	30
Military Order of World War	Patriotic	30
Military Training Camp Association	Patriotic	15
Minute Men of America	Patriotic	15
Mobilization for Human Needs (see Community Chest Councils)		
Montreal Symphony	Cultural	2 57
Mother's Day (see Golden Rule Foundation)		
Museum of Modern Art	Cultural	2 30
Museum of Science & Industry in Chicago	Scientific	2 30
Musical Adventures	Cultural	15
Music Educators National Conference	Cultural	15 30
National Advertised Brands (see Drug Topics)		
National Advisory Committee on Women's Participation at World's Fair	Civic	15
National Art Society	Cultural	8 30
National Association of Automobile Dealers	Business	1 00
National Association for the Advancement of Colored People	Civic	26
National Association of Broadcasters	Business	45
National Association of Cost Accountants	Business	18
National Association of Manufacturers	Business	5 17
[fol. 443]		
National Association of Mutual Savings Banks	Business	15
National Association of Purchasing Agents	Business	30
National Association of Real Estate Boards	Business	15
National Association of Retail Druggists	Business	13
National Association of Retail Grocers	Business	15
National Association of Teachers of Speech	Educational	25
National Automobile Association	Business	25
National Board of Fire Underwriters	Business	29
National Catholic Welfare Conference	Charitable	25
National Committee on Cause & Cure of War	Political	30
National Committee for Music Appreciation	Civic	30
National Conference of Christians & Jews	Religious	37
National Council of Catholic Charities	Charitable	1 00
National Council of Catholic Men	Religious	26 30
National Council of Catholic Women	Religious	4 15
National Council of Jewish Women	Religious	15
National Council of Teachers of English	Educational	15
National Council of Teachers of Speech	Educational	15
National Council of Women of U. S., Inc.	Civic	2 45
National Defense Commission	Governmental	57
National Democratic Clubs	Political	30
National Educational Association of the U. S.	Educational	1 30
National Farm & Home Hour (see Dept. of Agriculture)		
National Federation of Music Clubs	Cultural	3 00
National Federation of Stamp Clubs	Educational	13 00
National First Aid Week. (see National Association Retail Druggists)		

Organization	Classification	Total Time Hr. Min
National Foundation for American Youth	Political	15
National Foundation of Infantile Paralysis	Charitable	5 59
National Geographic Society	Scientific	27
National Hotel Association	Business	23
National Interfraternity Council	Educational	23
National Labor Relations Board	Governmental	15
National League of Women Voters	Political	15
National Maritime League	Business	1 00
National Metal Congress Exposition	Business	15
National Music Week Committee	Cultural	1 45
National Music Camp	Cultural	10 00
National Negro Congress	Civic	44
National Petroleum Association	Business	30
National Philharmonic Symphony	Cultural	1 00
National Press Club	Business	39
National Public Housing Conference, Inc.	Civic	29
National Radio Demonstration Debate (see National University Extension Association)		
National Radio Forum (see Washington Evening Star)		
[fol. 444]		
National Republican Club	Political	5 00
National Resources Planning Board	Governmental	5 00
National Security League	Patriotic & Political	44
National Society of New England Women	Patriotic	15
National Sojourners	Patriotic	30
National Symphony Orchestra	Cultural	1 30
National Tuberculosis Association	Charitable	15
National University Extension Association	Educational	1 00
National Urban League	Civic	15
National Vespers (see Federal Council of Churches of Christ in America)		
National Youth Administration (see N. Y. A Radio Workshop)	Governmental	30
New Friends of Music	Cultural	15 57
News Welfare Association	Charitable	2 27
Newspaper PM Inc.	Business	15
New York City Water Supply Control Department	Civic	30
New York Federation of Music Clubs	Cultural	15
New York Herald Tribune	Civic	9 02
New York Newspaper Women's Club	Business	15
New York State Conference on Social Work	Civic	13
New York State Federation of Labor	Labor	25
New York State Health Department	Civic	13
New York World's Fair	Business	28 06
Northern Baptist Church	Religious	30
Northern Ohio Opera Association	Cultural	1 00
Northwestern University	Scientific	30
Olivet College	Cultural	15
Oregon Republican Club	Political	30
Paderewski Fund for Polish Relief	Charitable	45
Palestine Conservatory of Music in Jerusalem	Charitable	44
Pan-American Union	Governmental	4 23
Parents Magazine	Educational	22
Parent Teachers Association	Educational	30
Pennsylvania Society	Political	26
Peoples Lobby, Inc.	Political	1 45
People's Mandate	Patriotic	15
Pharmacy Week (see American Pharmaceutical Association)		

Organization	Classification	Total Time Hr. Min.
Phi Beta Kappa	Educational	15
Phi Mu Alpha Sinfonia Fraternity	Cultural	15
"Pilgrimage of Poetry" (see Library of Congress)		
P. M., Inc. (see newspaper P. M., Inc.)		
Police & Fire Dept. Toy Campaign	Charitable	10
Poor Richard Club	Civic	30
Port of New York Authority	Civic	15
[fol. 445]		
Presbyterian General Assembly	Religious	09
President's Birthday Ball (see National Foundation for Infantile Paralysis)		
Progressive Education Association	Educational	30
Prohibition Party of the U. S.	Political	15
Propeller Club (see National Maritime League)		
Protestant Episcopal Church	Religious	30
Public Affairs Committee, Inc.	Educational	1 30
Radio Pulpit (see Federal Council of Churches of Christ in America)		
Radio Workshop (see Mary Miller Vocational High School)		
Raising a President (see Dept. of Labor)		
Red Cross (see American Red Cross)		
Religion in the News (see Federal Council of Churches of Christ in America)		
Republican Club of Massachusetts	Political	30
Republican Mass Meeting (Nebraska)	Political	1 20
Republican National Committee	Political	47 11
Republican State Committee	Political	1 17
Reserve Officers Association	Patriotic	12
Rochester Civic Orchestra	Cultural	19 00
Rochester Philharmonic	Cultural	6 00
Rotary International	Civic	30
Salvation Army	Charitable	1 13
San Francisco Church Federation	Religious	30
San Francisco Fair	Business	53
San Francisco Opera Association	Cultural	2 51
San Francisco Symphony	Cultural	1 00
Scholastic Magazine	Cultural	30
Scholastic Press Association (see Columbia University)		
Science on the March (see American Association for the Advancement of Science)		
Sigma Alpha Epsilon Fraternity	Educational	14
Sixth Avenue Association	Business	15
Smith College Alumni Association	Educational	15
Socialist Party of the U. S.	Political	1 41
Society of the Friendly Sons of St. Patrick	Patriotic	30
Sons of the American Revolution	Patriotic	20
Southern Baptist Church	Religious	24
[fol. 446]		
St. Louis Cooperative Employment Council	Civic	30
St. Louis Opera Association	Cultural	55
Stanford University	Scientific	4 00
State Charities Aid Association	Charitable	15
Sunday Vespers (see Federal Council of Churches of Christ in America)		
Synagogue Council of America	Religious	1 00
"This Our America" (see National Resources Planning Board)		

Organization	Classification	Total Time Hr. Min.
Topeka Chamber of Commerce	Business	30
Toronto Promenade Symphony	Cultural	4 15
Town Hall, Inc.	Educational	24 30
Townsend Plan Organization	Political	15
Traveler's Aid Society	Charitable	24
Twentieth Century Fund	Charitable	3 15
Tuskegee Institute	Educational	45
Union of American Hebrew Congregation	Religious	4 30
United Auto Workers (see Congress of Industrial Organizations)		
United Brotherhood of Carpenters & Joiners of America (see American Federation of Labor)		
United Hospital Fund of N. Y.	Charitable	27
United Jewish Laymen's Committee	Religious	26 00
United Lutheran Church	Religious	15
United Mine Workers (see Congress of Industrial Organizations)		
U. S. Army Recruiting Programs (see U. S. Military Academy)		
U. S. Chamber of Commerce	Business	1 46
U. S. Committee for the Care of European Children	Charitable	15
U. S. Conference of Mayors	Civic	30
U. S. Junior Chamber of Commerce	Business	59
U. S. Marine Corps	Governmental	30
U. S. Military Academy	Governmental	2 30
U. S. Office of Education	Governmental	38 45
U. S. Public Health Service	Governmental	15
U. S. Secret Service (see Dept. of Treasury)		
University & College Glee Clubs	Educational	8 00
University Broadcasting Council of University of Chicago (see Field Museum of Natural History of Chicago)		
University of California (see Stanford University)		
University of Chicago	Educational	26 00
[fol. 447]		
University of Cincinnati, Oratorio Society	Educational	1 00
University of Pennsylvania	Educational	1 07
University of Rochester	Educational	1 09
University of Virginia	Educational	48
University of Wisconsin	Educational	1 00
Unlimited Horizons (see Stanford University)		
Vassar College	Educational	20
Vermont State Republican Club	Political	29
Veterans of Foreign Wars	Patriotic	3 34
Veteran Wireless Operators Association	Scientific	15
Vocational Guidance Association (see American Association for Adult Education)		
Vocational Service for Juniors	Civic & Educational	45
Washington Evening Star	Political	15 30
Washington State Republican Club	Political	29
Westminster College	Cultural	30
White House Conference on Children in a Democracy	Charitable	1 26
Winston-Salem, N. C., Chamber of Commerce	Business	30
Women's National Republican Club	Political	59
Women's Symphony Orchestra	Cultural	1 30
Woodmen of the World Life Insurance Society	Business	30
Worker's Education Bureau of America	Labor	15
World Is Yours (see U. S. Office of Education)		
World Peaceways, Inc.	Political	15
Young Democratic Clubs	Political	46

Organization	Classification	Total Time Hr. Min.
Young Men's Christian Association	Civic	45
Young People's League of the United Synagogue of America	Religious	30
Young Republican Club of North Carolina	Political	29
Young Republican League of Iowa	Political	25
Young Women's Christian Association	Civic	13
Youth Builders, Inc.	Civic	22
Youth Committee Against War (see Keep America Out of War Congress)		
Youth To-day Magazine	Educational	30

Organization time shown includes local broadcasts on WEAJ and WJZ.

[fol. 448]

EXHIBIT "E" TO AFFIDAVIT

Outstanding Public Service Programs

NBC Red & Blue Networks

1941

NBC Symphony Tuesday Blue 9:30-10:30 PM

Symphonic music conducted by outstanding conductors. Currently—Leopold Stokowski. Last year—Arturo Toscanini.

November 13th, 1937—to date.

National Farm and Home Hour

Mon-Fri Blue 12:30-1:00 PM

Saturday Blue 12:30-1:30 PM

News, music and information of special interest to farmers and homemakers. Cooperation U. S. Department of Agriculture.

July 8, 1929—to date.

Music Appreciation Hour Friday Blue 2:00-3:00 PM

A series of music appreciation programs dedicated to schools and colleges of the United States; conducted by Dr. Walter Damrosch. Programs graded to suit mentality of pupils of both primary and higher grades.

October 26th, 1928—to date.

America's Town Meeting of the Air

Thur Blue 9:15-10:00 PM

Series of forum programs broadcast from floor of Town Hall presenting leaders of various fields of thought in

American political, economic life in discussion of current problems.

May 30th, 1935—to date.

[fol. 449] University of Chicago Round Table

Sun Red 2:30-3:00 PM

Discussion of the current topics of political, economic and social interest by members of University of Chicago faculty and prominent leaders in above field of interest.

February 1st, 1931—to date.

Rochester Civic Orchestras Fri Blue 10:00-10:30 PM

Program of classical music.

November 29th, 1929.

Great Plays Sun Blue 3:00-4:00 PM

Dramatic program showing the development of the drama from the Greek to the present day; featuring outstanding artists from the stage and radio.

February 26th, 1938—to date.

Hemisphere Revue Wed Blue 9:00-9:30 PM

Variety program built to show the talent of all the Americas, and to cement our feeling of good will; featuring stars from the radio and stage and guest speakers from the South American countries.

May 14th, 1941—to date.

For America We Sing Mon Blue 9:30-10:00 PM

Musical series under the auspices of the Treasury Department in the interest of Defense Stamps and Bonds—featuring stars from the operatic and concert stage.

July 22, 1941—to date.

Radio City Music Hall Sunday Blue 12:30-1:30 PM

Program of classical music, operatic renditions of chamber music recitals; conducted by Erno Rapee.

January 14th, 1934—to date.

[fol. 450] Good Neighbors

Thursday Red 10:30-11:00 PM

Series presented by NBC to help the people of North America to become better acquainted with our neighbors.

in South America; twenty-two dramatized human interest programs built around the twenty Central and South American republics.

May 22nd, 1941—October 16th, 1941.

America Looks Abroad Sunday Blue 12:00-12:15 PM

Series of programs of non-partisan discussion of current issues by members of Foreign Policy Association under whose auspices the series are run.

October 29th, 1939—to date.

I'm an American Sunday Blue 12:15-12:30 PM

Series of talks by naturalized American citizens telling why they wanted to become an American citizen; outstanding personalities have been interviewed. Produced in cooperation with the U S Department of Justice.

May 4th, 1940—to date.

National Radio Forum Monday Blue 9:00-9:30 PM

Discussions of current issues by leading governmental figures—in cooperation with the Washington Star.

January 18th, 1932—to date.

World Is Yours Sunday Red 1:30-2:30 PM

Series of weekly dramatizations of exhibits in Smithsonian Institution in cooperation with Smithsonian Institution and U S Office of Education.

June 7th, 1936—to date.

New Friends of Music Sunday Blue 6:05-6:30 PM

Chamber music societies featured from Town Hall stage—Budapest String Quartet and Primrose String Quartet examples of music featured.

January 23rd, 1938—to date.

[fol. 451] Between the Bookends

Mon thru Fri Blue 1:15-1:30 PM

Poetry by Ted Malone.

Sept 5, 1938.

Behind-the Mike Sunday Blue 4:30-5:00 PM

Program presenting stories behind programs, personalities and every phase of radio from the entertainment standpoint.

September 15, 1940—to date.

Listen America Sunday Red 3:30-4:00 PM

Dramatizations of the stirring and significant story of America's mighty new quest for health in cooperation with the Women's National Emergency Committee and outstanding speakers in government and public life.

June 13th, 1941—to date.

Story Behind the Headlines

Sunday Red 11:15-11:30 PM

Cesar Saerchinger, noted foreign correspondent, discussing news events of the week, with sketch of historical background leading up to it. Program in cooperation with American Historical Association.

March 4th, 1938—to date.

Spin and Win With Jimmy Flynn

Saturday Blue 9:00-9:30 PM

Quiz type of audience participation program presented in a circus or carnival atmosphere with Master of Ceremonies, Jimmy Flynn, questioning participants from army bases throughout the country in a "barker" style.

November 20th, 1940—to date.

[fol. 452] Wake Up America Sunday Blue 2:00-3:00 PM

Hour long radio forum, produced by NBC in cooperation with the American Economic Foundation; devoted to discussions of currently important economic issues by noted speakers. Both sides of the issue are presented.

September 28th, 1941—to date.

Speaking of Liberty Thursday Red 6:30-6:45 PM

Series of programs under auspices of the Council for Democracy. Rex Stout as M C, brings to the microphone each week authors, journalists, etc of note, whose work has led them to explore fields of "thinking about democracy".

April 17th, 1941—to date.

Story Dramas by Olmstead

Monday, Wednesday, Friday Red 11:15-11:30 PM

Dramatized versions of the world's greatest ghost stories, as collected and told by Nelson Olmstead.

September 30th, 1940—to date.

Raising a President Monday Blue 11:30-11:45 AM

Program directed toward mothers, regarding the care and guidance of their children, presented in cooperation with the Children's Bureau, U S Department of Labor. In a "Court of the Air" type of presentation, problem letters of parents are dramatized and then discussed by a panel composed of one parent and two child guidance experts.

October 2nd, 1940—to date.

What Can I Do Thursday Blue 11:45-12:00 Noon

Program answering the question of American women who want to do their part in defense. Sylvia Porter, finance editor gives economic side of picture. Defense news of week as it concerns women is given. June Hynd interviews a woman who has an active place in the defense picture.

July 31st, 1941—to date.

[fol. 453] Alva Kitchell's Streamline Journal

Tuesday Blue 11:30-12:00 Noon

A program where one of radio's most popular artists meets her friends in an intimate period of visiting in which she tells new facts about broadcasting and the people engaged in it; brings visitors to the microphone.

December 4th, 1939—to date.

Travelling Cook Thursday Blue 11:00-11:15 AM

Friday " " " "

Richard Kent, bringing romance to the kitchen in a series of broadcasts featuring fool-proof recipes from every corner of the globe.

November 14th, 1939—to date.

Defense for America Saturday Red 7:00-7:30 PM

Series of programs in cooperation with the National Association of Manufacturers dealing with American industry actually at work on National Defense projects. Industry's

weekly report to the nation on the progress of national defense production.

February 22nd, 1941—October 25th, 1941.

[fol. 454] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. MULLEN, VICE-PRESIDENT AND GENERAL MANAGER OF NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Frank E. Mullen, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. This affidavit is made in opposition to defendants' motions to dismiss the complaint or, in the alternative, for summary judgment.

The effect of the issuance by the Federal Communications Commission of its Order relating to chain broadcasting on May 2, 1941, in Docket No. 5060 (Exhibit D to the verified complaint herein), has been forcibly called to my attention by the large number of letters received from independently operated affiliates of NBC, cancelling their respective affiliation contracts with NBC or refusing to abide by the terms of existing affiliation contracts.

[fol. 455] As stated in the affidavit submitted by Niles Trammell, President of NBC, in support of plaintiffs' motion for a preliminary injunction, between May 2, 1941, and October 30, 1941, not less than 48 affiliated stations having effective contracts of affiliation with NBC containing one or more provisions of the types described in the Commission's Order, served notice upon NBC of cancellation of said contracts or of refusal to abide by the existing terms thereof.

Copies of 15 representative letters are hereto annexed and marked Exhibits 1 to 15, inclusive.

Unless a preliminary injunction is granted in this action, substantially all of NBC's affiliated stations will take

similar action to cancel their existing affiliation contracts or to refuse to abide by their terms.

Frank E. Mullen.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

[fol. 456] **Exhibits to Affidavit of Frank E. Mullen**

EXHIBIT 1

Copy

(WPTF Letterhead)

Raleigh, N. C.—June 4, 1941.

Mr. William S. Hedges, Vice President, National Broadcasting Company, Inc., New York, N. Y.

DEAR MR. HEDGES:

You may regard this letter as our formal notice of cancellation of affiliation contract between the National Broadcasting Company and the WPTF Radio Company, dated April 15, 1939, said cancellation to become effective August 2, 1941. We are exercising this cancellation privilege as provided in paragraph fifteen of the contract aforementioned, inasmuch as said contract is in conflict with Federal Communications Commission regulations 3.101, 3.102, 3.103, 3.104, 3.106, 3.107, and 3.108 (Commission Order in Docket No. 5060, May 2, 1941).

The above cancellation notice applies likewise to the agreements set forth in your letters of December 30, 1940, and January 8, 1940, which were written as supplements to the affiliation contract dated April 15, 1939.

While we are issuing this formal cancellation notice in regard to the contract above mentioned, we shall be glad to enter into negotiations with the National Broadcasting Company with the view toward executing another affiliation contract which will comply in all respects with and be sub-

ject to all rules and regulations now in effect or hereinafter promulgated by the Federal Communications Commission.

Sincerely yours, (Signed) J. R. Weatherspoon.

[fol: 457]

EXHIBIT 2

Copy

W H K Y

Hickory, North Carolina,
May 17, 1941.

The National Broadcasting Company, R. C. A. Bldg., Radio
City, New York, N. Y.

Attn. Mr. Phil Merryman

DEAR MR. MERRYMAN:

I have just received a copy of The Rules and Regulations promulgated by the Commission pursuant to the Report on Chain Broadcasting.

Upon examination of Rules 3.101 to 3.108 inclusive, it clearly appears that our present contract with you will be illegal after July 31, 1941. Unless this effective date of the Rules and Regulations is extended, in one manner or another by appropriate authority, it is our desire to consummate a new arrangement with you on or before that date. Undoubtedly you have given considerable study to this matter and we would appreciate receiving any suggestions as to an appropriate form of contract.

It appears also that our license would be in jeopardy should we continue our affiliation with you after the effective date of the above-mentioned Rules, unless you have divested yourself of one of the two networks which you now own. Before we could legally enter into any new arrangement with you, therefore, it would be necessary that we receive your warranty that the Rules and Regulations of the Commission have been satisfied in this respect.

It is our desire to continue our affiliation with your network but naturally we can not do so at the expense of our license.

We would appreciate your early advice in regard to this matter.

Yours very truly, Catawba Valley Broadcasting Co.,
Inc. (Signed) W. T. Hix, Manager.

h.

[fol. 458]

EXHIBIT 3

True Copy

W J D X

Jackson, Miss.

July 3, 1941.

National Broadcasting Company, New York, N. Y.

Attention Mr. William Hedges

DEAR BILL:

At the suggestion of our legal representatives we are writing in reference to our network affiliation agreement dated March 15, 1935, together with supplement of November 4, 1940, an addition thereto, between The Lamar Life Insurance Company and the National Broadcasting Company for the use of the facilities of Broadcast Station WJDX, located at Jackson, Mississippi. We are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108 inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Needless to say, I hope the rule will never be put into effect, but that we may conform to the legal requirements please see that this is given the necessary attention.

Cordially and sincerely yours, (Signed) Wiley Harris, W. P. Harris, Director Lamar Life Station WJDX.

WPH:S.

[fol. 459]

EXHIBIT 4

Copy

Phoenix Republic and Gazette

June 23, 1941.

Mr. Niles Trammell, President, National Broadcasting Company, RCA Building, 30 Rockefeller Plaza, New York City, N. Y.

DEAR NILES:

You more than anyone else, I believe, have a present appreciation of how time is moving on at a terrifically fast rate.

August 2 will be here before we will realize it and unless there is a change in the effective date of the Commission's recent regulations 3.101 to 3.108, it will have been essential that there shall have been established a new relationship between KTAR and KVOA and the National Broadcasting Company. Such a relationship will of course have to give effectiveness to the new rules and unless (such is established, or unless the order is rescinded, or the effective date delayed, it is apparent that it will be necessary for us to cancel the effectiveness of the present contract.

At Yuma's request their letter has been sent to you and Safford has been talking over the telephone with us for a number of days.

We have explained to them that it is not to be doubted that you will be sending along that which will be representative of the kind of a relationship you will hope to establish in lieu of that which will have been outlawed, if that comes to pass.

This letter has as its purpose to ask you to give us your proposal as an acceptable substitute for present contracts

for KTAR and KVOA, as well as, we would presume, Safford and Yuma.

Sincerely yours, W. W. Knorpp.

W. W. Knorpp-n.

[fol. 460]

EXHIBIT 5

Copy

WEBC, Duluth, Minn.

June 11th, 1941.

Mr. William S. Hedges,
National Broadcasting Company, Inc.,
New York, N. Y.

GENTLEMEN:

We are faced with the necessity of complying with the recently adopted rules of the Communications Commission relating to stations engaged in chain broadcasting and accordingly give you notice herewith of cancellation of our affiliation agreement with your company effective as of August 1, 1941, when we understand the new rules are effective. Should this effective date be postponed by action of the Commission, or otherwise, the effective date of this cancellation is similarly deferred.

We believe that programs which you sponsor and make available to us are of great value to us in enabling our station to operate in the public interest. For this reason, we would like the opportunity of considering a new form of agreement with you, conforming to present rules and regulations of the Federal Communications Commission, which will enable us to continue to broadcast your programs.

Very truly yours, Central Broadcasting Company.
By W. C. Bridges (Signed).

[fol. 461]

EXHIBIT 6

Copy

KPRC, The Houston Post

July 16, 1941.

Mr. Niles Trammell, President,
National Broadcasting Company,
New York City, N. Y.

DEAR MR. TRAMMELL:

With reference to the affiliation contract of Radio Station KPRC with the National Broadcasting Company, I note that the orders of the Commission, adopted on May 2, 1941, relating to these contracts, become effective on August 2, 1941.

I, therefore, wish to inform you that on and after the effective date of these orders, on behalf of Radio Station KPRC, we will consider all parts of this affiliation agreement which are in conflict with the above orders as repealed and nullified by these orders.

Very truly yours, (Signed) W. P. Hobby, President,
Houston Printing Corporation.

WPH/lc.

[fol. 462]

EXHIBIT 7

Copy

Flint Broadcasting Company
Flint, Mich.

May 27, 1941.

National Broadcasting Company
RCA Building
New York, N. Y.

Attn: Mr. William S. Hedges

GENTLEMEN:

Please be advised of our intention to cancel our contract with the National Broadcasting Company and the King-Trendle Broadcasting Corporation dated August 31, 1938,

cancellation to be effective as of the close of business July 31, 1941; and cancellation to take effect unless there should be a postponement of the regulations of the Federal Communications Commission issued May 2, 1941.

Kind regards.

Sincerely yours, (signed) Howard M. Loeb, Managing Director, Flint Broadcasting Company.

HMLoeb.

RD.

cc: King-Trendle Broadcasting Corp.

[fol. 463]

EXHIBIT 8

True Copy

The Kansas City Star

July 3, 1941.

National Broadcasting Company, Inc.
Radio City, Rockefeller Plaza
New York, New York

GENTLEMEN:

You are hereby notified that the undersigned cancels and terminates the agreement heretofore existing between you and the undersigned, dated September 22, 1936, such termination and cancellation to be effective as of July 31, 1941.

It is the desire of the undersigned, as the operator of station WDAF, to make programs broadcast by your network available to its listeners under arrangements conformable to the Federal Communications Act and lawful regulations of the Federal Communications Commission. We desire to enter into negotiations with your company for a new contract, and suggest that a conference be arranged for discussion of terms in the near future.

Yours very truly, The Kansas City Star Company.

By (Signed) Earl McCollum, Vice President,
Owner and Operator of Radio Station WDAF.

[fol. 464]

EXHIBIT 9

True Copy

City of St. Petersburg, Florida

July 16, 1941.

National Broadcasting Company
R. C. A. Building
New York City

Attention: Mr. William H. Hedges, Vice President

DEAR MR. HEDGES:

Please take notice that pursuant to the Commission's order in Docket 5060 in the matter of the investigation of chain broadcasting promulgated on May 2, 1941, we are hereby canceling the agreement between the City of St. Petersburg and your Company, dated November 26, 1940, the cancelation to become effective on August 2, or on such other date as the Commission might designate as the effective date of its order.

It is the desire of the City of St. Petersburg to continue its affiliation with the National Broadcasting Company and we are now prepared and are willing to enter into a new agreement which will be consistent with the Commission's regulations.

Yours very truly, (Signed) G. V. Leland, City Manager.

[fol. 465]

EXHIBIT 10

Copy

Lehigh Valley Broadcasting Co.
Allentown, Pennsylvania

May 26, 1941.

National Broadcasting Company
30 Rockefeller Plaza
New York, N. Y.

GENTLEMEN:

This is formal notice of our desire to cancel our affiliation contract with the National Broadcasting Company as

of August 1, 1941. This cancellation is pursuant to the terms of our contract which is subject to any rules and regulations of the Commission and is required as a result of the regulations recently adopted by the Commission.

In the event that the effective date of these regulations should be postponed beyond August 1, 1941, the effective date of this cancellation shall be postponed for the same period.

It is our desire to negotiate a revised contract which will conform with the regulations as adopted as soon as is practicable.

Sincerely yours, (Signed) B. Bryan Musselman,
Vice-President.

BBM:om.

[fol. 466]

EXHIBIT 11

Copy

KYUM, Yuma, Arizona

June 24th, 1941.

National Broadcasting Company, Inc.,
R. C. A. Building, Radio City,
New York City, N. Y.

Re: Radio Station KYUM contract.

GENTLEMEN:

At a special meeting of the Board of Directors of the Yuma Broadcasting Company, held on June 19th, 1941, the following Resolution was adopted:

"Whereas, the Federal Communications Commission on May 2nd, 1941, issued an Order in Docket No. 5060, containing Regulations 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, and,

"Whereas, such Order and Regulations make necessary some changes in the outstanding contracts of the Yuma Broadcasting Company,

"Therefore, Be It Resolved, that the Board of Directors of the Yuma Broadcasting Company instruct its management to effectuate a new contract, which will meet the terms of the Order, with any concern with whom this corporation now has a present contract, to take the place

of such existing contract, in the event that the said Order and Regulations are not modified or revised, or their effective date postponed, and, in the event that a new contract, which will permit radio station KYUM operated by this company to operate strictly in accordance with the Orders and Regulations of the Commission, cannot be effectuated that then all necessary steps be taken to terminate any contract in conflict with such Orders and Regulations."

[fol. 467] Our contract with you, as you know, consists of the offer contained in your letter of February 8th, 1940, and our acceptance thereof indorsed thereon.

Since the making of the Order by the Commission we have studied the contract with a view of determining, if we could, what changes would have to be made therein to conform with the regulations of the Commission now in effect, and which, of course, must be complied with. We have come to the conclusion that the necessary changes or modifications are so great that it is useless for us to make any suggestions until we know what your Company intends to do, since, as we understand the Regulations, this Station will not be permitted thereunder to continue the acceptance of network services from you, to do so being in violation of Sections 3.106 and 3.107, relating to the ownership by network companies of two networks and of two stations covering the same market.

We have appreciated very much the network services furnished us by you, and would like to continue network services from you if a contract can be worked out, which is not in conflict with the regulations. In the event that such a contract cannot be worked out, and, in the further event that the Order and Regulations of the Commission are not modified, or revised, or more time not given in which to determine whether a contract can be drawn that is acceptable under the Commission's regulations, it will be necessary for us to discontinue your network services at the end of the prescribed 90 day period.

Under the circumstances, we would appreciate it very much if you would submit for our consideration and acceptance such modified or revised contract as your company believes will meet the requirements of the Regulations of the Commission. We make this request as we are not in

position to know what your company plans to do, or what network services you will be in position to offer.

Yours very truly, Yuma Broadcasting Company, By
(Signed) John H. Huber, President.

RNC/Mc.

[Vol. 468]

EXHIBIT 12

Copy

Memphis Publishing Company

Memphis, Tennessee

June 16, 1941.

National Broadcasting Co.
RCA Building, Radio City
New York City

GENTLEMEN:

In view of the provisions of Section- 3.107, 3.108 and other pertinent regulations of the Federal Communications Commission published May 2, 1941, we are under the necessity of advising you of our intention to discontinue the affiliation contract of WMC with your company, effective at the close of business July 31, 1941, unless:

"The effective date of the Commission's regulations is postponed," or

"Your company places itself in a position where we are free to negotiate a contractual affiliation conformable to the regulations."

Very truly yours, Memphis Publishing Company,
Enoch Brown, Jr., Vice President & General Manager.

[fol. 469]

EXHIBIT 13

Copy

KSOO
KELO

Sioux Falls, S. D.

June 20, 1941.

Mr. William S. Hedges
Vice-President in Charge of Stations
National Broadcasting Company
RCA Building Radio City
New York City

DEAR BILL:

In accordance with the new Rules and Regulations of the Federal Communications Commission concerning the chain affiliations of station licenses, we are writing you regarding the KSOO and KELO affiliation contracts with the National Broadcasting Company.

As you know, KSOO is at present affiliated with the National Broadcasting Company as a member of the basic supplementary Red and Blue Networks. KELO is likewise at present a member of the basic supplementary Red and Blue Networks, taking network service after KSOO is no longer available.

Under the new Rules and Regulations of the Federal Communications Commission, we are notifying you that we are cancelling our present affiliation contracts for KSOO and KELO with the National Broadcasting Company. Our cancellation will take effect as of the close of business July 31, 1941. We will be glad to enter into a new affiliation agreement with you subject to the new Rules and Regulations of the Federal Communications Commission with respect to network operations, and we will look forward to a resumption of relations in compliance with these new Rules and Regulations.

Kind regards.

Sincerely yours Sioux Falls Broadcast Ass'n Inc.,
Joseph Henkin, President.

JH:S

[fol. 470]

EXHIBIT 14

True Copy

WBAL

Baltimore, Md.

July 3, 1941.

National Broadcasting Company, Inc.
RCA Building, Radio City
New York, New York

GENTLEMEN:

The WBAL Broadcasting Company (Radio Station WBAL) now has a contract with the National Broadcasting Company, dated October 29, 1936, for the broadcasting of NBC programs. The WBAL Broadcasting Company also has a contract with the National Broadcasting Company dated November 26, 1940, as modified on December 5, 1940 and February 14, 1941, which goes into effect on October 1, 1941, under the terms of which WBAL will broadcast programs of the red network.

Both of these contracts contain provisions which appear to be in conflict with the rules and regulations promulgated by the Commission as a result of the network investigation. We are advised that it will be necessary to modify both of these contracts by August 1, 1941, unless the effective date of these new regulations is postponed by the Commission.

This is to advise you that we stand ready to perform our contracts with your company in so far as the terms of these contracts are not in conflict with the Commission's rules and regulations.

Very sincerely yours, WBAL Broadcasting Company, by (Signed) H. C. Burke, President.

[fol. 471]

EXHIBIT 15

Copy

KGW KEX

Portland, Oregon

June 5, 1941.

Mr. William S. Hedges
National Broadcasting Co., Inc.
RCA Building
New York, New York

DEAR MR. HEDGES:

From a consideration of the recent regulations of the Federal Communications Commission with reference to network affiliation agreements, we are apparently faced with the necessity of amending the existing affiliation agreements with your company affecting the operation of our Stations KGW and KEX.

The effect of these regulations indicates that existing licenses of broadcasting facilities must present satisfactory evidence to the Commission concerning the contractual relations insofar as the same apply to network operations, and in this connection we would now invite a statement from your company indicative of its desires and intentions with respect to the changes in our existing contracts that may be necessary to meet the Commission requirements.

We are, of course, willing and desirous of continuing to release the network programs originating from and furnished by your company, and at the same time must comply with the Commission's regulations with respect to such network affiliations.

Would be pleased to have an expression of your views and comments on the procedure to be followed.

Yours very truly Arden X. Pangborn, Managing
Director.

axp lp

[fol. 472] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHILIP J. HENNESSEY, JR.

DISTRICT OF COLUMBIA,
Washington, ss:

PHILIP J. HENNESSEY, JR., being duly sworn, says:

I am a lawyer engaged in practice at Washington, D. C. Since 1938 I have been of counsel for National Broadcasting Company, Inc., in the proceedings designated Docket 5060 before the Federal Communications Commission under the Commission's Order No. 37. I am familiar with the scope of the Commission's public hearing, the requests for additional information directed to National Broadcasting Company by the Commission after the close of the public hearing, the Report of the Committee dated June 12, 1940, the briefs filed by NBC and others on or about November 12, 1940, the Oral Argument before the Commission on December 2 and 3, 1940, the Supplementary briefs filed with the Commission on January 2, 1941, the Commission's Order of May 2, 1941, and the amendments made to this Order thereafter.

The purpose of this affidavit is to demonstrate:

(a) That the proceedings before the Commission in Docket 5060 were legislative in character rather than judicial and

(b) That the public record of the proceeding in Docket 5060 does not contain any evidence of the economic effect of the Regulations promulgated by the Commission on May 2, 1941, as amended thereafter.

FCC Order No. 37 was issued on March 18, 1938. After reciting that

"The Commission has not at this time sufficient information in fact upon which to base Regulations regarding con-[fol. 473] tractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result;"

The Commission ordered:

"An immediate investigation to determine what special Regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters including those covered in the Report on Social and Economic Data prepared by the Engineering Department of the FCC and filed with the Commission on January 20, 1938."

The "Report on Social and Economic Data on Broadcasting" referred to in Order No. 37 is a volume of 197 pages (printed by the United States Government Printing Office in 1938) after an informal engineering conference which had been held beginning October 5, 1936. The subjects for discussion at this conference were:

1. Classification of broadcast stations.
2. Allocation of frequencies to different classes of stations.
3. Standards to be applied in determining coverage, and the presence or absence of objectionable interference.
4. Geographic distribution of broadcast facilities.
5. Standards and methods of measurements with respect to essential engineering phases of operation of broadcast stations.
- [fol. 474] 6. Apparatus performance requirements to be imposed on broadcast stations.
7. Social and economic effect of any proposals regarding the foregoing subjects.

The nature and scope of the 1936 hearing and the Report which followed it may be gauged from the following paragraphs which appear on page 1 of the introduction:

"In order not to burden the main Report with the detailed discussions of the testimony recorded in the October hearing, and to give some relief to the burden of studying the voluminous record of more than half a million words, exclusive of the vast data contained in the exhibits attached to the record, the Department has made a brief summary of

the testimony of each witness. This is attached hereto as Appendix C. In briefing summaries such as this, it is difficult to bring out all the points and therefore, final reliance may be had from the record itself.

"In constructing this Report we have utilized data taken from the records of the Commission in addition to the testimony at the hearing, and in drawing conclusions we have relied to some extent on our practical experience in broadcasting."

Order No. 37 itself recited 13 subjects upon which the Commission desired information as follows:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

[fol. 475] 4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. The nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

[fol. 476] 13. Extent and effects of concentration of control of stations locally, regionally or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly in so far as the same tends toward or results in restraint of trade or monopoly.

Thereafter a supplementary notice was issued by the Commission on September 20, 1938 which set forth twenty subjects upon which the Commission desired information from NBC and others:

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agreements or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

[fol. 477] 7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network.

[fol. 478] 14. History and development of policies with reference to the development of program talent and facilities or network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and

procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

16. The nature of the service rendered by each station licensed to the network, particularly, with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations.

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may [fol: 479] receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent of such duplications and amount of duplication required for adequate service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

On the same day, September 20, 1938, the Commission invited persons and organizations desiring to be heard to submit evidence through qualified and competent witnesses with respect to the matters covered by Order No. 37 and the 20 subjects set forth in the supplementary notice.

Both the original Order and the supplementary notice related to conditions then existing or to the historical development of such conditions. Neither the Order nor the supplementary notice called for any evidence of conditions prospectively.

From time to time statements were made during the public hearing in an effort to project into the future the operating experiences of the past but such statements were necessarily predicated upon the continuance of network broadcasting in a manner in which it was then and had theretofore been conducted.

At no time were such statements directed to any Rules or Regulations of the character promulgated by the Commission on May 2, 1941, nor could they have been because the earliest date upon which the Commission disclosed its intention to adopt specific Rules and Regulations was on November 28, 1940, about a year and a half after the public hearings were closed.

In opening the hearing on November 14, 1938 Chairman McNinch stated:

[fol. 480] "In order to expedite the hearing as much as possible the networks, the transcription companies and those persons and organizations who have filed notices of appearances will be permitted to be represented by counsel in presenting direct testimony. *Cross-examination of witnesses generally will be by the Committee and by its staff.* Parties desiring to ask questions, should, if at all possible, hand the Commission's counsel such questions in writing. Departure from this procedure will be allowed only where the Committee shall decide that the ends of justice will be served thereby, upon request pointing out the interest of the party desiring cross-examination and the purpose and scope thereof. The Commission shall be furnished with fourteen copies of each exhibit offered in evidence."

"The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, *appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legis-*

lative recommendations made to the Congress by the Commission.

"The Committee will not permit this hearing to be used as a sounding board for any person or organization. We are after facts and intend to get them. Only relevant opinions of those qualified to speak may be admitted for whatever light they may throw upon the problems involved in this investigation. I have emphasized that paragraph in order that none may miss it or misunderstand its purport or the intention of the Committee, that this is a factual inquiry and it will be held to that, plus the expression of [fol. 481] expert opinion that is relevant to matters at issue." (Emphasis added.)

The evidence submitted by NBC was responsive to all those items which the Commission had set forth in its original Order and in the supplementary notice of September 20, 1938. It covered in detail such matters as the organization of NBC departments, the types of programs produced, the mechanics of distributing programs to affiliated stations, listener preference among the various program types, the coverage of the affiliated stations, the development and uses of electrical transcriptions, the organization and functions of the NBC International Division, Talent, music, scripts, labor relationships, studios and studio construction, relationships between NBC and its advertising clients, income, expenses and balance sheets. The public record even contains a description of certain research done expressly for the hearing with respect to station coverage.

After the conclusion of the public hearing and in response to Commission requests of September 5 and September 25, 1939, certain additional financial and program information was submitted by NBC. After the Oral Argument on December 2 and 3, 1940 additional information was submitted pursuant to a request of December 20, 1940 concerning the organization of NBC departments. As late as April 11, 1941 the Commission requested additional information with respect to taxes to which NBC replied on April 14, 1941. None of these subjects were covered directly by the Regulations promulgated by the Commission, though all are influenced by such Regulations.

Although it is true, as asserted by Mr. Telford Taylor in his affidavit of November 5, 1941, that NBC testimony fills 3,225 pages of the transcript of the public hearing the

only NBC testimony which related directly to the subject matter of the Commission's Regulations—*i.e.* station contracts—was that of Mr. William S. Hedges. Hedges' complete testimony occupies 262 pages. The bulk of it concerns operations rather than contracts and none of it supports the Regulations adopted by the Commission.

[fol. 482] To the Report of the Committee which heard the evidence dated June 12, 1940 there was attached a "Digest and Analysis of evidence presented in the Hearing on Commission Order No. 37, (Docket 5060) and of the Rules of the Commission". At page 2 of that Digest it is stated:

"The record in this hearing is composed of 8,713 pages of testimony and 674 exhibits; there were 94 witnesses heard and the hearing consumed 73 days, extending over a period of six months.

"*This report is based upon evidence from these sources and also from information otherwise in the records of the Commission.*" (Emphasis added.)

The earliest proposal for any specific rule was made by Mr. Louis G. Caldwell on behalf of Mutual Broadcasting System on April 19, 1939 and appears in Volume 70 of the transcript on pages 8454, *et seq.* This motion proposed merely an interlocutory regulation "worded somewhat as follows":

"No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization or into any renewal or extension of their existing contract, agreement or other arrangement for a period extending beyond December 31, 1940."

This motion, which was repeated several times after the conclusion of the hearing, was not granted.

The report of the Committee, dated June 12, 1940, did not propose any regulations for adoption by the Commission.

No specific regulations had been proposed by the Commission when briefs were filed in November, 1940 upon the Committee Report.

[fol. 483] Not until November 28, 1940, five days before the date set for oral argument, did the Commission indicate

the type of regulations which it was considering for adoption and in its notice dated November 28, 1940 the Commission said:

"It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the Report of the Chain Broadcasting Committee."

On December 3, 1940, during the oral argument, Chairman Fly requested the parties to file supplementary briefs discussing the Commission's jurisdiction and the function of competition in broadcasting. These briefs were filed on January 2, 1941.

Between January 2, 1941 and May 2, 1941 there were no public proceedings. On May 2, 1941 the Commission formally promulgated Regulations 3.101 to 3.108, inclusive, which, as amended, are the subject of this action under Section 402 (a) of the Communications Act.

It thus clearly appears both from the terms of the original order itself, from the conduct of the proceedings thereafter, from the scope of the subject matter covered in the hearings, from the absence of any clearly defined issues and from the use of extra-record information by the Commission that the proceedings in Docket 5060 were legislative rather than judicial in character.

It also clearly appears that the evidence introduced at the public hearing in 1938 and 1939 could not have been directed toward establishing the effect upon network broadcasting of the regulations here in question since such regulations [fols. 484-485] were not formulated, even in a preliminary form, until November 28, 1940 and were not promulgated in their present form until May 2, 1941. On the contrary, it clearly appears that the evidence introduced at the public hearing related to conditions as then existing in the industry.

Philip J. Hennessey, Jr.

Subscribed and sworn to before me this 10th day of December, 1941. Esther J. Jenkins, Notary Public,
D. C. (Seal.)

My Commission Expires: January 2, 1945.

[fol. 486] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING TEMPORARY SUSPENSION
OF COMMISSION'S ORDER

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendant's Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, at last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been in the [fols. 487-488] form of a temporary restraining order issued after hearing.

United States of America, by Samuel Brodsky, Special Assistant to the Attorney General. Federal Communications Commission, by Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel. National Broadcasting Company, Inc., by Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill. Woodmen of the World Life Insurance Society, by Thomson, Wood & Hoffman, Attys., John B. Dawson. Stromberg Carlson Telephone Manufacturing Company, by Hill, Rivkins & Middleton, by Thomas H. Middleton.

So ordered: 11/12/41.

Learned Hand, U. S. C. J. John Bright, U. S. D. J.
Henry W. Goddard, U. S. D. J.

[fol. 489] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO INTERVENE

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

That the plaintiffs hereby consent to the appearance as of right in the above entitled proceedings of Mutual Broadcasting System, Inc. (which was a party in interest to the proceeding before the Federal Communications Commission entitled "In the Matter of the Investigation of Chain Broadcasting, Docket No. 5060"), pursuant to the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. A., Section 402 (a)) and of the Urgent Deficiencies Act (38 Stat. 219, 220; 28 U. S. C. A. Section 45 a), and that any party may enter an order [fol. 490] upon this stipulation without notice to the others.

Dated New York, N. Y., December —, 1941.

Wright, Gordon, Zachry, Parlin & Cahill, Attorneys
for National Broadcasting Company, Inc. Thom-
son, Wood & Hoffman, Attorneys for Woodmen of
the World Life Insurance Society. Hill, Rivkins
& Middleton, Attorneys for Stromberg Carlson
Telephone Manufacturing Company. Samuel
Brodsky, Special Assistant to the Attorney Gen-
eral for the United States of America, Telford
Taylor, Thomas E. Harris, Attorneys for Federal
Communications Commission. Leon Lauterstein,
Attorneys for Mutual Broadcasting System, Inc.

So ordered, 12/29/41.

Learned Hand, U. S. Circuit Judge. John Bright,
U. S. D. J. Henry W. Goddard, U. S. D. J.

[fol. 491] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROAD-
CASTING SYSTEM, INC., Interveners

Before: L. Hand, C. J., Goddard and Bright, D.JJ.

Upon motions before answer by the defendants under
Rule 12 (b) (1) to dismiss for lack of jurisdiction the com-
plainants in two actions brought under § 402 (a) of Title
47, U. S. Code, to enjoin and set aside certain regulations
of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.
[fol. 492] Charles E. Hughes, Jr., for the Columbia Broad-
casting System. Telford Taylor and Thomas E. Harris,
for the United States and the Commission. Louis G. Cald-
well, for the Mutual Broadcasting System, Inc., Intervener.

OPINION

L. HAND, C. J.:

These actions were brought to declare invalid and set
aside certain regulations originally promulgated by the
Federal Communications Commission on May 2, 1941, and
amended on October 11, 1941; in their final form they ap-
pear at the end of this opinion. After the actions were
filed the Commission, on October 31, 1941, promulgated a
further regulation in the form of a "minute", also appear-
ing at the end of the opinion. Preparatory to the issuance
of the regulations the Commission had held hearings at

which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motion by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would

be very expensive to operate, and its income would be small; especially if, as has become customary, it were to [fol. 494] add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power [fol. 495] to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction

over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal [fol. 496] which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (*The Chicago Junction Case*, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. *United States v. Baltimore & Ohio Railroad*, 293 U. S. 454; *Powell v. United States*, 300 U. S. 276; *Rochester Telephone Corporation v. United States*, 307 U. S. 125; *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408. (*Colorado v. United States*, 271 U. S. 153; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382; and *United States v. Idaho*, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon § 1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be un-

lawful; the situation then may present all the elements upon which equity will intervene in ordinary course. *Shields v. Utah Idaho Central Railroad Company*, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in *Venner v. Michigan Central*, 271 U. S. 127. But even so they would not be the actions at bar, which can be [fol. 497] brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more [fol. 498] than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Com-

mission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so, it [fol. 499] should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and

there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an “affiliate’s” license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the “renewal or modification of a station license;” but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under § 402 [fol. 500] (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an “affiliate’s” license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in “actions tried upon the facts without a jury.” It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings “in granting or refusing interlocutory injunctions;” but we are not “refusing” any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

Learned Hand, Henry W. Goddard.

[fol. 501] The Chain Broadcasting Regulations

Sec. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

Sec. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Sec. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

[fol. 502] Sec. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8: a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Sec. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing

network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Sec. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the [fol. 503] existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

Sec. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

Sec. 3.108. *Control by network of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[fol. 504] The Minute of October 31, 1941

Procedure in Docket No. 5060

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or

the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

[fol. 505]

DISSENTING OPINION

BRIGHT, D. J.: As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of

Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to [fol. 506] make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a network organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one network. These rules do not apply to stations not affiliated with any network. They apply only to contractual relations with networks, and in addition, prohibit the ownership by a network of more than one station in a specified service area and the ownership by any organization of more than one network. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national networks. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is

final is further emphasized by the statement, "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. . . . The regulations [fol. 507] we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by networks under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations [fol. 508] were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with N.B.C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits submitted by C.B.S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are

threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co. v. U. S.*, 14 F. Supp. 121; affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-making and rule-making is admitted in *U. S. v. Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, book-keeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City*

Southern Railway v. U. S., 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp. v. U. S.*, 249 U. S., 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction [fols. 510-511] of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L. v. Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce v. Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

(S.) John Bright, U. S. D. J.

[fols. 512-513] DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK

Civil Action No: 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY, and STROMBERG CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA and THE FEDERAL COM-
MUNICATIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

ORDER DISMISSING COMPLAINT—Filed February 21, 1942

Before: L. Hand, C. J., and Goddard and Bright, D.JJ.

This cause came on to be heard at the January, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof it is

Ordered, adjudged and decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

Learned Hand, Circuit Judge; Henry W. Goddard,
District Judge; ——— District Judge.

[fol. 514] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

SIRS:

Please take notice that the undersigned will bring the annexed motion on for hearing before this Court at Room No. 110, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 27th day of February, 1942, at 3:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for Na-

tional Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

[fol. 515] Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To:

Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y.

Telford Taylor, Esq., General Counsel, Federal Communications Commission, Washington, D. C.

Leon Lauterstein, Esq., Attorney for Mutual Broadcasting System, Inc., 15 William Street, New York, N. Y.

[fol. 516] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the complaint and all the affidavits and other papers filed, and all the proceedings heretofore had, herein, the plaintiffs move this Court for an order suspending and restraining the operation, enforcement or execution of the order of the Federal Communications Commission in Docket No. 5060 made May 2, 1941, as amended October 11, 1941 (in so far as the order purports to become effective on or before November 15, 1941), pending the hearing and determination of an appeal to be taken by the plaintiffs to the Supreme Court of the United States from the order or decree of this Court entered February 21, 1942, dismissing the complaint herein on the ground that this Court

has no jurisdiction over the subject matter of this action; [fols. 517-518] and for such other and further relief as to the Court may seem just.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange Street, Rochester, N. Y., of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 519] IN UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervenor

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL
BROADCASTING COMPANY, INC., Intervenor

Before L. Hand, C. J.; Goddard and Bright, D. J. J.,

PER CURIAM; OPINION

The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of [fol. 520] Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the

Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

[fol. 521] IN UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from its enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

[fol. 523] IN UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the February, 1942, term of this Court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

Ordered, Adjudged and Decreed that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 524] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR A DIRECT APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

To The Hon. Learned Hand, Circuit Judge for the Second Circuit; The Hon. Henry W. Goddard, District Judge for the Southern District of New York; The Hon. John Bright, District Judge for the said District:

Now come National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs herein, and feeling themselves aggrieved by the final order or decree of the District Court rendered and entered in the above-entitled cause on the 21st day of February, 1942, do hereby appeal therefrom to the Supreme Court of the

United States because of errors prejudicial to plaintiffs which are set forth in the assignment of errors presented and filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the [fol. 525] Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioners further pray that an order be made fixing the amount of security which your petitioners shall give and furnish upon such appeal.

John T. Cahill, Solicitor for National Broadcasting Company, Inc.; David M. Wood, Solicitor for Woodmen of the World Life Insurance Society; Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 526] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Come now National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the United States herein petitioned for in said cause from the decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 21st day of February, 1942.

1. The Court erred in dismissing plaintiffs' complaint upon the ground that the Court had no jurisdiction over the subject matter of the cause.
2. The Court erred in failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for herein.

[fols. 527-528] Wherefore, petitioners pray that the final order or decree entered herein on the 21st day of February,

1942, be reversed and that such other and further relief be granted as to the Court may seem just and proper.

John T. Cahill, Solicitor for National Broadcasting Company, Inc.; David M. Wood, Solicitor for Woodmen of the World Life Insurance Society; Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 529] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and Stromberg-Carlson
Telephone Manufacturing Company, Plaintiffs,

v.

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants,

MUTUAL BROADCASTING SYSTEM, INC., Intervenor

ORDER ALLOWING APPEAL

The plaintiffs herein having filed a petition for appeal to the Supreme Court of the United States from the decree entered herein on February 21, 1942, and having filed their assignment of errors; it is

Ordered, that an appeal by petitioners in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on February 21, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that bond on appeal, to be approved by this Court, is fixed at the sum of \$750.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 530] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

To The Hon. John J. Bennett, Jr., Attorney General of the State of New York, Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States, Telford Taylor, General Counsel for the Federal Communications Commission, and Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc.:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein February 21, 1942, dismissing the complaint of said petitioners praying that a certain order of the [fol. 531] Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promulgating certain regulations relating to radio stations and network organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this 2nd day of March, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc.; David M. Wood, Solicitor for Woodmen of the World Life Insurance Society; Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fols. 532-533]. ADMISSION OF SERVICE

Service of a notice of the taking of an appeal in the above-entitled action from a decree of the specially con-

stituted District Court of the United States for the Southern District of New York to the Supreme Court of the United States is hereby admitted this 5th day of March, 1942.

John J. Bennett, Jr. (MA), Attorney General of the State of New York.

[fol. 534] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

To the Solicitor General of the United States, Solicitor for the United States:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein February 21, 1942, dismissing the complaint of said petitioners praying that a certain order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promulgating certain regulations relating to radio stations and network [fols. 535-540] organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this 2nd day of March, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 541]

Draft No. 1

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

CITATION—Filed March 5, 1942

UNITED STATES OF AMERICA, ss:

To United States of America, Federal Communications Commission, Appellees, and Mutual Broadcasting System, Inc., Intervenor, Greeting:

Your are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C. within forty (40) days from the date hereof, pursuant to an order allowing an appeal from the decree of the statutory District Court of the United States for the Southern District of New York in an action in which National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company are appellants, United States of America and Federal Communications Commission are [fol. 542] appellees and Mutual Broadcasting System, Inc., is intervenor, to show cause, if any there be, why the said decree rendered against the said appellants should not be corrected.

Dated at New York, New York, this second day of March, 1942.

Learned Hand, United States Circuit Judge for the Second Circuit. Henry W. Goddard, United States District Judge for the Southern District of New York. John Bright, United States District Judge for the Southern District of New York.

[fol. 543]

[File endorsement omitted]

[fol. 544] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It is hereby directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, be [fol. 545] transmitted to the Supreme Court.

Learned Hand, U. S. C. J. — — —, U. S. D. J.
John Bright, U. S. D. J.

Agreed to:

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World. Thomas H. Middleton, Solicitor for Stromberg-Carlson. Charles Fahy, Solicitor General, by C. R. Denny. Charles Denny, Ass't. Gen'l. Counsel F. C. C. Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc. John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 546] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. Plaintiffs' complaint and Exhibits A through F, inclusive, thereto attached.
2. Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (includ-

ing Exhibits I through III, inclusive, attached thereto), John J. Gillen, Jr. and Edward A. Hanover, annexed thereto.

3. Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment together with the affidavits of Telford Taylor (including Exhibit A therein referred to) and William P. Massing annexed thereto.

[fol. 547] 4. Stipulation and order granting leave to Mutual Broadcasting System, Inc. to intervene.

5. Affidavits of Sidney N. Strotz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits 1 through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

6. Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction.

7. Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

8. Affidavits of Niles Trammell and Edgar Kobak, submitted by plaintiffs as reply affidavits.

9. Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

10. Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

11. Opinion of statutory District Court.

12. Dissenting opinion of Judge Bright.

13. Order dismissing the complaint.

14. Plaintiffs' notice of motion and motion for temporary restraining order.

15. Opinion of statutory District Court on motion for temporary restraining order.

16. Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

17. Decree of statutory District Court granting temporary restraining order.

18. Petition for appeal.

19. Assignments of error.

20. Jurisdictional statement (including Exhibits A and B).

21. Supplement to jurisdictional statement (including Exhibits A and B).

22. Defendants' waiver of right to file statement opposing jurisdiction.

23. Intervenor's waiver of right to file statement opposing jurisdiction.

24. Order allowing appeal.

[fols. 548-551] 25. Citation on appeal.

26. Notice of appeal.

a. Addressed to Attorney General of the State of New York, et al.

b. Addressed to Solicitor General of the United States.

27. Bond on appeal.

28. Statement calling attention to the provisions of Supreme Court Rule 12(3).

29. Plaintiffs' affidavits of service of papers on appeal.

30. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

31. This praecipe and service thereof.

Said transcript is to be prepared as required by law and the Rules of this Court, and the Rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: March 5, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of above-praecipe accepted and acknowledged this 5 day of March, 1942. The defendants and the intervenor waive their right to file a designation of additional portions of the record.

Charles Fahy, Solicitor General by C. R. Denny. Charles R. Denny, Jr., Ass't & Gen'l Counsel F. C. C. Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc.

[fol. 552] SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL—Filed March 9, 1942

1. Come now the appellants in the above-entitled cause and for their statement of the points on which they intend

to rely on their appeal to this Court adopt the points contained in their assignments of error heretofore filed herein.

2. Appellants further state that only the following parts of the record, as filed in this Court, need be printed for the hearing of this appeal:

(a) Plaintiffs' complaint and Exhibit A through F, inclusive, thereto attached. Exhibits B and D furnished.

[fol. 553] (b) Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (omitting Exhibits I through III, inclusive, attached thereto), John J. Gilles, Jr. and Edward A. Hanover, annexed thereto.

(c) Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment, together with the affidavits of Telford Taylor (omitting Exhibit A therein referred to, the original of which Exhibit has been certified to this Court separately and not as a part of said transcript of record) and William P. Massing, annexed thereto.

(d) Stipulation and order granting leave to Mutual Broadcasting System, Inc., to intervene.

(e) Affidavits of Sidney N. Strutz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits 1 through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

(f) Affidavits of Niles Trammell and Edgar Kobak, submitted by plaintiffs as reply affidavits.

(g) Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

(h) Opinion of statutory District Court.

(i) Dissenting opinion of Judge Bright.

(j) Order dismissing the complaint.

(k) Plaintiffs' notice of motion and a motion for temporary restraining order.

(l) Opinion of statutory District Court on Motion for temporary restraining order.

(m) Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

(n) Decree of statutory District Court granting temporary restraining order.

(o) Petition for appeal.

- (p) Assignments of error..
- [fol. 554-555] (q) Jurisdictional statement (including Exhibits A and B).
- (r) Supplement to Jurisdictional Statement (including Exhibits A and B).
- (s) Defendants' waiver of right to file statement opposing jurisdiction.
- (t) Intervenor's waiver of right to file statement opposing jurisdiction.
- (u) Order allowing appeal.
- (v) Citation on appeal.
- (w) Notice of appeal.
- (a) Addressed to Attorney General of the State of New York, et al.
- (b) Addressed to Solicitor General of the United States.
- (x) Statement calling attention to the provisions of Supreme Court Rule 12(3).
- (y) Plaintiffs' affidavits of service of papers on appeal.
- (z) Stipulation and order directing Clerk to transmit original of Exhibit A, attached to affidavit of Telford Taylor of November 5, 1941.
- (aa) Plaintiffs' praecipe and service thereof.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of the foregoing statement on behalf of each of the appellees is acknowledged this 9th day of March, 1942.

Charles Fahy, Solicitor General of the United States.

Charles R. Denny, Solicitor for the Federal Communications Commission. Louis G. Caldwell, Solicitor for Mutual Broadcasting System, Inc.

[fol. 556] [File endorsement omitted.]

[fol. 557] SUPREME COURT OF THE UNITED STATES

APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF THE
RECORD ON APPEAL—Filed March 9, 1942

1. Now comes the appellees, United States of America, the Federal Communications Commission, and Mutual

Broadcasting System, Inc., and designate for printing the following additional portions of the record:

a. Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction, excluding Exhibit A therein incorporated by reference.

b. Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

[fol. 558] c. Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

Charles Fahy, Solicitor General of the United States.
Charles R. Denny, Assistant General Counsel, Federal Communications Commission. Louis G. Caldwell, Attorney for Mutual Broadcasting System, Inc.

Service of the foregoing counter designation is hereby acknowledged this 9th day of March, 1942.

John T. Cahill, Solicitor for National Broadcasting Co., Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 559] [File endorsement omitted.]

[fol. 560] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 16, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[fol. 561] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1941

No. 1025

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY AND STROMBERG CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants. MUTUAL BROADCASTING
SYSTEM, INC., Intervener

STIPULATION AND ADDITION TO RECORD

It is hereby stipulated, consented, and agreed by and be-
tween the undersigned that the record in the above entitled
action be corrected in the following respect:

Due to a typographical error, the second sentence in Para-
graph "27" of the Complaint herein reads as follows:

"Two of the six Commissioners dissented."

The above sentence should be corrected to read:

"Two of the seven Commissioners dissented."

Charles Fahy, Solicitor General of the United States
of America. Telford Taylor per Harry M. Plotkin,
General Counsel for the Federal Communications
Commission. John T. Cahill, Solicitor for Na-
tional Broadcasting Company, Inc. David M.
Wood, Solicitor for Woodmen of the World Life
Insurance Society. Thomas H. Middleton, Solici-
tor for Stromberg-Carlson Telephone Manufac-
turing Company. Louis G. Caldwell, Solicitor for
Mutual Broadcasting System, Inc.

Dated March 26, 1942.

Endorsed on Cover: File No. 46,353 S. New York, D. C. U. S., Term No. 1025. National Broadcasting Company, Inc.; Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Appellants, vs. The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc. Filed March 9, 1942. Term No. 1025, O. T. 1941.

(9471)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941

No. 1025

**NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
AND STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,**

vs.

Appellants,

**THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION AND MUTUAL
BROADCASTING SYSTEM, INC.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

STATEMENT AS TO JURISDICTION.

**JOHN T. CAHILL,
DAVID M. WOOD,
THOMAS H. MIDDLETON,**
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 1025

**NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
AND STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,**

Plaintiffs,

vs.

**UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION,**

Defendants;

MUTUAL BROADCASTING SYSTEM, INC.,

Intervener.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioners in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represent:

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

1. Section 402(a) of the Communications Act of 1934, United States Code, Title 47, Section 402(a) (47 U. S. C. A., Sec. 402(a)).

2. The Urgent Deficiencies Appropriation Act, October 22, 1913, Chapter 32 (38 Stat. 219, 220; United States Code, Title 28, Section 47(a); 28 U. S. C. A., Section 47(a)). This Act provides that an appeal may be taken directly to the Supreme Court of the United States from decrees made by statutory three-judge courts granting or denying injunctions against the operation of orders of the Interstate Commerce Commission.

Said Section 402(a) of said Communications Act makes the aforesaid section of the Urgent Deficiencies Act applicable to orders of the Federal Communications Commission.

II.

Order of the Federal Communications Commission, the Validity of Which is Involved.

On May 2, 1941; the Federal Communications Commission made the following order:

"Commission Order in Docket No. 5060.

"In the Matter of the Investigation of Chain Broadcasting.

"May 2, 1941.

"WHEREAS, The Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization¹ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

¹The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control² with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organiza-

² The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

tion which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,

Secretary.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

"Federal Communications Commission
Washington, D. C.

October 11, 1941.

Order.

"At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

"The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend

its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

"It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be And The Same Is Hereby, Amended in the following particulars:

"Sections 3.102, 3.103, 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options³ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours⁴ within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.⁵ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"The last paragraph of said order is hereby amended to read as follows:

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties;

³ As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

⁴ All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

⁵ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa."

and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

T. J. SLOWIE,
Secretary.

III.

Date of Decree and of Application for Appeal.

The final decree of the statutory three-judge court dismissing appellants' complaint upon the ground that the Court lacked jurisdiction of the subject matter of the action is dated February 21, 1942 and was entered herein on February 21, 1942.

The application for this appeal was made on February 27, 1942.

IV.

Nature of the Case.

Pursuant to Section 402(a) of the Communications Act of 1934 (47 U. S. C. A. Section 402(a)) and Section 209 of the Judicial Code (28 U. S. C. A. Section 45), a complaint was filed in the District Court of the United States for the Southern District of New York invoking the Court's jurisdiction under said Section 402(a) and subdivision 28 of Section 41 of Title 28, U. S. C. A., to set aside, annul and suspend the said order of the Federal Communications Commission made on May 2, 1941, as amended October 11, 1941.

A three-judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, Chapter 32 (38 Stat. 220; 28 U. S. C. A. Section 47). The case was heard in the Dis-

district Court by three judges and a final decree was entered on the 21st day of February, 1942, dismissing the suit for want of jurisdiction, one judge dissenting.

V.

Decisions Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Shannahan, et al. v. United States, 303 U. S. 596 (1938);

Alton Railroad Co. v. United States, 287 U. S. 229 (1932);

Powell v. United States, 300 U. S. 276 (1937);

Rochester Telephone Corp. v. United States, et al., 307 U. S. 125 (1939); and

American Telephone & Telegraph Co. v. United States, 299 U. S. 232 (1936).

Appellants respectfully submit that the United States Supreme Court has jurisdiction of this appeal.

Copies of the opinion delivered by the Court upon the rendering of the decree sought to be reviewed and the dissenting opinion of Judge Bright are attached to this statement as Appendices A and B thereto, respectively.

Respectfully submitted,

JOHN T. CAHILL,

*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,

*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,

*Solicitor for Stromberg-Carlson Telephone
Manufacturing Company.*

Dated February 27, 1942.

EXHIBIT A.**UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK.**

**NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and Stromberg-Carlson
Telephone Manufacturing Company, Plaintiffs,**

v.

**UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants**

MUTUAL BROADCASTING SYSTEM, INC., Intervener

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

**FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROAD-
CASTING SYSTEM, INC., Interveners**

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the complaints in two actions brought under § 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.
Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission.

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. HAND, C. J.:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the

Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the

background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels

itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have

just implied; it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. *United States v. Baltimore & Ohio Railroad*, 293 U. S. 454; *Powell v. United States*, 300 U. S. 276; *Rochester Telephone Corporation v. United States*, 307 U. S. 125; *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408. (*Colorado v. United States*, 271 U. S. 153; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382; and *United States v. Idaho*, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon § 1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. *Shields v. Utah Idaho Central Railroad Company*, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in *Venner v. Michigan Central*, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station

license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 Stat. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company, this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under § 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some dis-

position to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

LEARNED HAND.

HENRY W. GODDARD.

The Chain Broadcasting Regulations.

SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network or.

ganization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

The Minute of October 31, 1941.

Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to

court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

EXHIBIT B.

BRIGHT, D. J.: As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934 we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of Appeals aforesaid. This order, in my opinion, does not come within

any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the Defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a net work organization, except rule 3.106, which relates to a license to be granted to a net work organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a net work maintaining more than one net work. These rules do not apply to stations not affiliated with any net work. They apply only to contractual relations with net works, and in addition, prohibit the ownership by a net work of more than one station in a specified service area and the ownership by any organization of more than one net work. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national net works. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is fur-

ther emphasized by the statement, "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. . . . The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by net works under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining net works. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with N. B. C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Com-

mission's order. Similarly, it is shown by the affidavits submitted by C. B. S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these net works await the idle ceremony of a denial of license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The net works are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co. v. U. S.*, 14 F. Supp. 121; affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-

making and rule-making is admitted in *U. S. v. Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, book-keeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City Southern Railway v. U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L. v. Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce v. Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

(S.) JOHN BRIGHT,
U. S. D. J.

Dated: February 20, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1025

**NATIONAL BROADCASTING COMPANY, INC.,
WOODMEN OF THE WORLD LIFE INSURANCE
SOCIETY AND STROMBERG-CARLSON TELE-
PHONE MANUFACTURING COMPANY,**

Plaintiffs,

vs.

**UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION,**

Defendants.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervener.

SUPPLEMENT TO JURISDICTIONAL STATEMENT.

Supplementing their jurisdictional statement filed in the statutory District Court on February 27, 1942, the petitioners respectfully represent:

Copies of the opinion delivered by the Court upon the rendering of a decree restraining the enforcement of the regulations drawn in question in this case until May 1, 1942, or the argument of the appeal herein in the Supreme Court

of the United States, whichever is earlier, and the findings of fact and conclusion of law rendered in connection with said decree, both of which were rendered following the filing of petitioners' original jurisdictional statement, are attached to this supplemental jurisdictional statement as Appendices A and B hereto, respectively.

Respectfully submitted,

JOHN T. CAHILL,
*Solicitor for National Broad-
casting Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson Tele-
phone Manufacturing Company.*

Dated March 3, 1942.

APPENDIX A.**UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK.**

Civil Action No. 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, *Defendants.*MUTUAL BROADCASTING SYSTEM, INC., *Intervenor.*

Civil Action No. 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff,*

v.

UNITED STATES OF AMERICA, *Defendant.*THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL
BROADCASTING COMPANY, INC., *Intervenors.*

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Per CURIAM:

The Commission is, of course, right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and, indeed, they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined

in a renewal proceeding. Considering, on the one hand, that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and, on the other, that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

APPENDIX B.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, *Defendants*.

MUTUAL BROADCASTING SYSTEM, INC., *Intervenor*.

Findings of Fact.

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from

the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from its enforcement, if the conditions mentioned in the First Finding exist.

Conclusion of Law.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

LEARNED HAND,

U. S. C. J.

HENRY W. GODDARD,

U. S. D. J.

JOHN BRIGHT,

U. S. D. J.

APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 16-178.

NATIONAL BROADCASTING COMPANY, INC., et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*,

and

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

Waiver.

Appellees United States of America and Federal Communications Commission hereby waive their right to file a statement opposing jurisdiction in this case.

CHARLES FAHY,
Solicitor General.

(Signed) TELFORD TAYLOR,
*General Counsel, Federal
Communications Commission.*

March 4, 1942.

APPENDIX D.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY, and STROMBERG CARLSON
TELEPHONE MANUFACTURING COMPANY, *Plaintiffs,**v.*THE UNITED STATES OF AMERICA and FEDERAL COMMUNICA-
TIONS COMMISSION, *Defendants,*

and

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.***Waiver.**Appellee, Mutual Broadcasting System, Inc., hereby
waives its right to file a statement opposing jurisdiction
in this case, as provided in Rule 12, paragraph 3, Revised
Rules of the Supreme Court of the United States.LEON LAUTERSTEIN,
By EMANUEL DANNETT,
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Attorney for Mutual
Broadcasting System, Inc.,
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CHARLES ELMORE CROPLEY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN
OF THE WORLD LIFE INSURANCE SOCIETY and
STROMBERG-CARLSON TELEPHONE MANUFACTURING
COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

JOHN T. CAHILL,
*Solicitor for National Broadcasting Com-
pany, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World Life
Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson Telephone
Manufacturing Company.*

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the District Court (R. 432), the dissenting opinion of Judge Bright (R. 441), and the *per curiam* opinion of the District Court (R. 449), are not yet reported.

Jurisdiction

The decree of the District Court was entered on February 21, 1942 (R. 446). The petition for direct appeal to this Court was filed February 27, 1942 (R. 451), and was allowed on March 2, 1942 (R. 453).

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended (28 U. S. C., Section 345), providing for the direct review by the Supreme Court of a final judgment or decree of a District Court of three judges under the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive), as extended by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Section 402(a)). This Court noted probable jurisdiction on March 16, 1942.

Question Presented

The question presented is whether the statutory three-judge District Court has jurisdiction to review the Order of the Federal Communications Commission, hereinafter described, under Section 402(a) of the Communications Act of 1934.

Statutes Involved

The statutes pertinent to this appeal are annexed to this brief as Appendix A. They are:

The Urgent Deficiencies Act (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive).

The Communications Act of 1934, Section 402, and Sections 4(i), 303(f) and (i), 307(a), 309(a) and (b), 312(a) and 502 (48 Stat. 1093, 1064, 1068, 1082, 1083, 1085, 1086, 1100; 47 U. S. C., Sections 402, 154(i), 303(f) and (i), 307(a), 309(a) and (b), 312(a) and 502); also Section 303(r) (50 Stat. 191; 47 U. S. C., Section 303(r)).

Statement

This suit was brought by National Broadcasting Company, Inc. (hereinafter called NBC), the pioneer nationwide network organization engaged in radio broadcasting, and by Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, two licensees of radio broadcasting stations, against the United States and the Federal Communications Commission. The purpose of the suit is to set aside an Order of the Commission (in so far as it purported to become effective on November 15, 1941), on the ground that the Commission lacks power to make the Order. The Order was entered May 2, 1941, and amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." In both instances two Commissioners dissented. The original Order and the amendment are annexed to this brief as Appendix B for the convenience of the Court.

The complaint (R. 1) was filed in the United States District Court for the Southern District of New York on October 30, 1941 and was dismissed for lack of jurisdiction over the subject matter on February 21, 1942 (R. 446).

The portions of the Order sought to be enjoined are directed at contracts between network organizations (such as NBC) and independently owned and operated radio broadcasting stations (such as the co-appellants), pursuant to which network broadcasting is conducted. The effect of the Order upon such contracts is material to a consideration of the jurisdiction of the District Court and it is necessary at the outset to give a brief description of the industry.

Chain or Network Broadcasting

Radio broadcasting in other countries is operated by the government and is supported by taxation. In this country radio broadcasting is not a governmental enterprise and is supported wholly by advertising (R. 41, 433). All stations are, however, operated under license from the Federal Communications Commission.

Radio broadcasting in the United States is conducted by approximately 800 standard broadcast stations scattered throughout the nation. Most stations maintain a continuous schedule of programs throughout the broadcasting day, which generally covers 16 to 18 hours. These programs may be commercial programs, paid for or sponsored by advertisers, or they may be what are called "sustaining" or non-sponsored programs which are used to fill time not utilized by advertisers and to create good-will. Sustaining programs are, of course, like everything else in radio broadcasting, paid for out of advertising revenues which are the sole source of broadcasting income (R. 168-170, 227-228).

Radio broadcasting is pre-eminently a national medium of expression and a large part of the advertising revenue available to radio comes from national network advertising. The factor giving to radio broadcasting its unique usefulness and functions, enabling it to subsist in stiff competition with a variety of competing media, is its ability to cover the entire nation at the same instant. This simultaneous nation-wide circulation is insisted upon by national radio advertisers (R. 7-8, 40, 229-230).

The availability of an instantaneous means of simultaneous national communication makes radio an incalculable asset both in peace and in war. It is a vehicle of expression

unequalled even by the press and is a potent instrument for the attainment of national unity.

All stations are of limited range and power and no single station has sufficient coverage to satisfy the needs of national advertisers or of the nation for simultaneous nation-wide circulation. Such circulation can only be obtained from the cooperation of many and far-flung separate radio stations. This is attained in the United States through a widespread system of contracts (known as "affiliation contracts") between a network organization and independent standard broadcast stations (known as "affiliates") (R. 5-8, 434).

A network organization is essentially a program production and distribution agency. It is the central agency which enables a large number of individual stations to furnish a national service although it operates relatively few stations itself. For example, the NBC "Red Network" as of June 1, 1941 was composed of 76 stations, of which only 6 were operated by NBC (R. 8 and 26A). Individual stations operated by network organizations are, of course, licensed by the Federal Communications Commission but the Act does not provide for the licensing of network organizations, as such.*

The studios of a network organization are connected with its affiliated stations by special telephone lines over which a particular commercial or sustaining program is distributed to the individual stations from which the pro-

* There are four national network organizations: National Broadcasting Company, Inc., Blue Network Company, Inc. (both companies being wholly-owned by Radio Corporation of America), Columbia Broadcasting System, Inc., and Mutual Broadcasting System, Inc. Blue Network Company, Inc. was organized after the commencement of this suit to operate the "Blue Network" formerly operated by National Broadcasting Company, Inc. In addition there are numerous regional networks (R. 139).

gram is then simultaneously broadcast. The affiliation contracts set forth the terms upon which these programs are distributed. By means of affiliation contracts, the individual stations are so organized as to make available, both commercially and for public service, a method of instantaneous and simultaneous nation-wide communication. Through the same means these stations are enabled to obtain commercial and sustaining programs of national significance (R. 5-8).

The system of affiliation contracts is the essence of chain or network broadcasting as presently conducted. It represents a careful and delicate balance between the autonomy of the independent local stations in rendering both a local and a national service and the dependence of the national service upon simultaneous nation-wide circulation. The terms of NBC's affiliation contracts are described in the complaint (R. 7) and a form of contract is annexed to the complaint as Exhibit A (R. 18).

The typical affiliation contract provides that NBC will furnish the individual station with a full schedule of sustaining programs and pay the cost of the special telephone lines, and that the proceeds from the sale of network time will be apportioned between NBC and the station. The individual station, on the other hand, grants to NBC an option to sell certain specified periods of the affiliate's time, totaling $8\frac{1}{2}$ out of 16 to 18 hours per day, exercisable on 28 days' notice. This clause, known as the option time clause, makes possible simultaneous nation-wide network circulation and by it a purchaser of time on the network can be assured of full network circulation on 28 days' notice. Appellants regard option time as the *sine qua non* of network broadcasting. It is the most bitterly contested substantive issue in this case.

Each affiliated station is separately engaged in scheduling its daily complement of programs. Each network organization is at the same time engaged in scheduling a daily series of network programs to be broadcast by the affiliated stations. In the absence of some provision enabling the network to arrange for guaranteed periods of time on all affiliates, it is inevitable that conflicts in time commitments as between the network and one or more stations will arise.

The national advertiser must be assured of simultaneous national circulation. This is necessary to attract an advertiser to radio in the first instance and also to induce him to embark upon a particular advertising campaign. Without the continuing certainty that such circulation will be available when wanted, neither network nor advertiser could afford to enter into commitments for the expensive and varied talent necessary to produce network programs (R. 159, 168-170).*

The failure of a single station located in a market indispensable to an advertiser, or the failure of a sufficient number of less important stations, to accept a particular program, would cause the advertiser to withdraw, would defeat the desire of all of the other affiliated stations to carry the program, and would deprive the public of a nationwide network program (R. 159, 168-170, 235-236).

The very existence of nation-wide network broadcasting is, therefore, dependent upon the ability of a network to operate as a cohesive unit, and that ability is based upon the affiliation contracts and upon option time in particular (R. 6-8). It is alleged in the complaint (R. 16) that nation-

*Were the network organization remitted to inquiring of each affiliated station as to the availability of a particular hour, half, or quarter hour, reporting to the advertiser what stations are available, and re-inquiring again of the stations as to the continued availability of time, it could never guarantee coverage to the advertiser.

wide network broadcasting cannot feasibly be conducted without affiliation contracts containing clauses for the optioning of time of independent standard broadcast stations for nation-wide broadcasting. As stated by the dissenting Commissioners, Craven and Case (R. 152):

"It is axiomatic that unlimited availability of the few existing radio facilities, and efficient national program distribution cannot both be attained at the same time."

The Commission's Order

On March 18, 1938 the Commission on its own motion issued its order No. 37 (R. 131), entitled "Order Instituting Chain Broadcasting Investigation", to gather sufficient information to determine what special regulations applicable to radio stations engaged in chain broadcasting should be promulgated by it under the authority of Section 303(i) of the Communications Act of 1934. The matters specified for investigation were industry-broad in scope and covered all aspects of nation-wide network broadcasting (R. 131).

Hearings were held between November 14, 1938 and May 19, 1939. A committee consisting of three Commissioners issued a report on June 12, 1940, and on November 28, 1940 the Commission announced its procedure for oral argument on this committee report (R. 137). The announcement contained certain proposed chain broadcasting regulations (R. 137). On December 2 and 3, 1940 oral argument was held before the Commission on the committee report and the proposed regulations (R. 37-38). Briefs were filed by NBC and others both on the substance of the proposed regulations and on the jurisdiction of the Commission (R. 38, 116, 127).

On May 2, 1941 the Commission issued its Report on Chain Broadcasting (R. 29) together with its original Order

(R. 127). The Order promulgated eight regulations dealing with substantially every important aspect of network broadcasting. Two of the regulations, 3.106 and 3.107, sought to effect a forced disposition by NBC of either its "Red" or "Blue" network and the forced disposition of certain stations licensed directly to NBC and other network organizations. It is not necessary to discuss the substance of these two regulations as they have been largely postponed in effect. The remaining six regulations, 3.101-3.105 and 3.108, sought to effect a drastic revision of the contracts of affiliation between the network organizations and independent standard broadcast stations.* For example, regulation 3.104 wholly prohibited option time.

Two of the seven Commissioners dissented (R. 151) on the grounds that the Commission was without power to adopt the regulations and that some of the contract provisions prohibited by the regulations, including option time, were essential to network broadcasting (R. 159).

Effective Dates and Amendment of the Commission's Order

The Order provided that the Commission would issue no license to a standard broadcast station having relationships prohibited by the Order and also provided that it was effective immediately,

"Provided, that, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order; Provided further, That the effective date of Regulation 3.106 may be extended from time to time with

* Except when otherwise indicated by the context, references to the Order in this brief are to these six regulations only.

respect to any station in order to permit the orderly disposition of properties."* (R. 128)

Negotiations between the radio broadcasting industry and the Commission resulted in five postponements of effective dates of various parts of the Order, those portions of the Order dealing with existing affiliation contracts finally being made effective on November 15, 1941 (R. 1-2, 201-203).

Extensive hearings upon the regulations were held before the Senate Committee on Interstate Commerce from June 2 to June 20, 1941 (R. 201).** During July and August following these hearings a series of conferences was held between the industry and the Commission (R. 202). On September 12, 1941 there was a rehearing in connection with a petition of Mutual Broadcasting System, Inc., requesting certain amendments of the regulations (R. 202).

On October 11, 1941 the Commission issued its Supplemental Report on Chain Broadcasting (R. 201) together with its Order amending the original Order in several respects (R. 213). One amendment was with respect to regulation 3.104 which had previously prohibited all option time. As amended, this regulation continued to prohibit a true option on any part of a station's time and invented something the Commission called a "non-exclusive option". It is of the essence of an option that it be good against the world but this so-called "non-exclusive option" is not good against any network organization, whether regional or national. Even in so far as it is exercisable against others it can only be exercised for certain portions of a day and upon not less than 56 days' notice. This amendment, while intricate and confusing, has precisely the same disastrous effect as complete prohibition.

* All emphasis in this brief is supplied.

** These hearings are reported as *Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong. 1st Sess. (1941)*.

Two Commissioners again dissented on the ground that the Commission had no jurisdiction and on the ground that the option time regulation was as bad as before (R. 215).

Damaging Effect of the Commission's Order

The Commission's Order caused immediate and drastic injury to the nation-wide broadcasting enterprise carried on by NBC and its affiliated stations, including the two co-appellants. Between May 2, 1941 when the original Order was promulgated and October 30, 1941, the date of the filing of the complaint herein, 48 stations affiliated with NBC served notice of the abrogation of their contracts of affiliation (R. 16). Copies of representative letters from affiliated stations abrogating their contracts *as of the effective date of the regulations expressed in the Order* are attached to the affidavit of Frank E. Mullen (R. 405-419), submitted in opposition to defendants' motion to dismiss.* In addition between May 2, 1941, and November 12, 1941, when the Order was suspended by stipulation of the parties and order of the District Court, NBC and independent stations were unable to renew contracts containing the provisions desired, or to enter into new contracts, although they otherwise would have renewed or entered into such contracts (R. 16).

The Suit

As a result of these drastic and incisive effects of the Order of May 2, 1941 and of the Order as amended October

* The court below fell into plain error when it stated " * * * a number of 'affiliates' have declared that they will be obliged to break their contracts *when their licenses are renewed* * * * " (R. 435). This is an important mistake of fact. The record in this case shows that affiliates have cancelled and threatened to cancel their contracts *as of the effective date of the regulations as expressed in the Order* (R. 405-419).

11, 1941, appellants brought suit in the District Court for the Southern District of New York against the United States and the Federal Communications Commission, under Section 402(a) of the Communications Act of 1934, to set aside the Order, as amended, in so far as it purported to become effective on November 15, 1941, on the ground that the Order was beyond the power of the Commission (R. 14) and that appellants were irreparably injured thereby (R. 16). The complaint together with a motion for preliminary injunction was filed on October 30, 1941. On the same day Columbia Broadcasting System, Inc., also brought suit in the same court to enjoin certain portions of the Order. The two cases were not consolidated but were heard together in the court below and the Columbia suit is the companion case in this Court, No. 1026. Mutual Broadcasting System, Inc., being peculiarly advantaged by the Order, intervened in both cases and supported the Commission.

The day after appellants filed their complaint the Commission adopted a "minute" (R. 379) proposing that if a station wished to contest the validity of the Order or the reasonableness of its application to such station, the station's license would be set for hearing and it would receive a temporary license pending such hearing and any appeal therefrom. The "minute" stated that if a station failed in such appeal it would nevertheless receive a license upon compliance with the Order. The "minute" also stated that the adoption of such procedure was without prejudice to the rights of any person to petition the Commission for a modification or stay of the Order.

By stipulation of the parties and order of the District Court dated November 12, 1941, the Commission suspended its Order (R. 430) and it was informally agreed by letter between the parties that this suspension should be effective

until 10 days after service of an order of the District Court disposing of appellants' motion for a temporary injunction.

The United States and the Commission filed motions to dismiss the complaint or in the alternative for summary judgment (R. 375). The District Court upheld appellees' contention that it was without jurisdiction over the subject matter of the action (R. 432) and dismissed the complaint (R. 446), Judge Bright dissenting (R. 441).

The United States and the Commission insisted and the Court held that there was jurisdiction in the Court of Appeals for the District of Columbia to review the Order under Section 402(b) of the Act on appeal from a licensing proceeding before the Commission (R. 436-438). In view of this determination, counsel for appellants sought an agreement from the Commission whereby representative license renewal proceedings would be instituted to review the Order in that manner, provided the Commission would stay enforcement of the Order pending determination of its validity in such proceedings. This the Commission refused to do.

Thereupon, appellants moved the District Court for a stay of the Order pending this appeal (R. 447). On March 2, 1942, the District Court entered an order restraining the Federal Communications Commission from enforcing its Order until May 1, 1942, or the argument of this appeal, whichever might be earlier (R. 451).

In granting this temporary stay the Court below found:

"II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity" (R. 450).

and stated in its opinion:

"The Commission is of course right in saying that we have decided that the plaintiffs have adequate

protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. *If so, the plaintiffs will not be adequately protected, and, indeed, they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding*" (R. 449).

Specification of Errors

The District Court erred:

1. In dismissing plaintiffs' complaint upon the ground that the Court had no jurisdiction over the subject matter of the case.
2. In failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for in the complaint.

Summary of Argument

There is no question on this appeal as to whether the Commission's action is reviewable by any court, since the Commission concedes, and the District Court held, that such action is subject to review under Section 402 of the Act. The sole question is whether the proper procedure for review of the Commission's Order is that provided by Section 402(a) of the Act, as contended by appellants, or that provided by Section 402(b), as contended by appellees.

Section 402(a) provides that suit may be brought as provided in the Urgent Deficiencies Act to enjoin, set aside, annul or suspend "any order of the Commission under this

Act", with 5 specific exceptions covered by Section 402(b). Section 402(b) provides a different procedure, by appeal to the Court of Appeals for the District of Columbia, to be followed when the Commission's order is one of the five types specifically excepted from Section 402(a), each of these five types being orders granting or denying applications for licenses or for modifications thereof.

The Order of the Commission here in question is an "order" promulgating special regulations applicable to all radio stations engaged in chain broadcasting, adopted after an extended hearing instituted by the Commission and amended after rehearing. It has caused affiliates of NBC to regard their present affiliation contracts as illegal and to cancel such contracts as of the effective date of the Order, without regard to the expiration dates of their licenses.

The Order appears to come squarely within the provisions of Section 402(a) as an "order" promulgating regulations. It neither grants nor denies a license of any kind and it has no recognizable relationship to any of the five specific types of orders reviewable under Section 402(b) of the Act.

Although an exercise of the rule-making power by the Federal Communications Commission such as the present order is normally reviewed under Section 402(a) (*American Telephone & Telegraph Co. v. United States*, 299 U. S. 232 (1936)), and similar exercises of power by the Interstate Commerce Commission are normally reviewed under the Urgent Deficiencies Act (*The Assigned Car Cases*, 274 U. S. 564 (1927); *United States v. Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935)), the Commission here seeks to avoid this normal course of review. It argues that because of the wording used in the regulations, "no license shall be granted," the Court should hold that the Order is not what it purports to be.

This argument of the Commission is based upon pure verbalism. Every substantive characteristic of the Order also shows that it is an "order" reviewable under Section 402(a) of the Act. It was formulated and made as an order promulgating definitive regulations which the Commission meant to be complied with and which are enforceable apart from licensing proceedings. As of its effective date it has caused contract cancellations and has forestalled new contracts. The mere fact that the regulations are negative in form and are directed in terms to the Commission does not affect reviewability under Section 402(a). (*Rochester Telephone Corporation v. United States, et al.*, 307 U. S. 125 (1939); *Powell v. United States*, 300 U. S. 276 (1937).)

The sole remaining question is whether the "minute" adopted by the Commission after the commencement of the present suit affords a reasonable basis for deciding that the possibility of reviewing the Order under Section 402(b) displaces the normal procedure for review under Section 402(a).

This question must be answered in the negative. The "minute" in no way operates to change the form or the substance of the Order, but recognizes the regulations therein contained as definitive enforceable regulations. Although the "minute" indicates that the Commission desires to have the regulations reviewed under Section 402(b), the inappropriateness of that procedure (which was designed for the review of individual licensing proceedings) as a means of reviewing regulations of general applicability is not subject to serious question. The Commission is unable, moreover, to point to any overriding reason of policy which requires that the present issues be reserved for decision on an appeal under Section 402(b).

The "minute" gives immunity from the Order only to individual litigants under special circumstances and leaves the Order otherwise fully effective. Instead of according blanket protection such as was given in *Landis, et al. v. North American Co.*, 299 U. S. 248 (1936), the Commission has expressly refused to stay enforcement of its Order pending its review in a test case, indicating that it desires something more than an appropriate procedure for review. There can be no doubt but that the Commission wants the immediate obedience to its regulations which has resulted and will continue to result from the fact that such regulations are, both in form and in substance, definitive, enforceable regulations.

These circumstances permit of only one conclusion. The Commission's Order is reviewable in this action under Section 402(a) and the District Court was in error in dismissing appellants' complaint on the ground that the Court had no jurisdiction over the subject matter of the case.

ARGUMENT

I

The Commission's Order is, on its face, an "order" promulgating regulations which is a proper subject for review under Section 402(a) of the Act.

There is no question on this appeal as to the jurisdiction of the Supreme Court to hear and determine this appeal under Section 238 of the Judicial Code (28 U. S. C., Section 345). The only issue relates to the jurisdiction of the specially constituted three-judge District Court over the subject matter of this action.

This issue does not involve the question whether the action which the Commission has taken is subject to review by any court. It is freely conceded by the Commission that its action is subject to judicial review under Section 402 of the Communications Act of 1934 and the District Court so held. The only question here at issue is whether the correct procedure for the review of this action by the Commission is that prescribed by Section 402(a), as we contend, or that prescribed by Section 402(b), as urged by the Commission and held by the District Court. Hence this case is unlike cases such as *Perkins, et al. v. Lukens Steel Co., et al.*, 310 U. S. 113 (1940), wherein the controlling question was whether any court could pass upon administrative action of the character there involved.

The question for decision in this case is a narrow one which arises only because Congress has provided two different procedures for bringing before the courts the legality of reviewable action taken by the Commission. This Court is asked to decide whether the procedure provided by Section 402(a) of the Communications Act is a proper procedure for reviewing the Order of the Commission here in question.

The Statute

The availability of one or the other of the two methods of review established by Section 402 depends upon the character of the action taken by the Commission. Section 402(a), under which the present action is brought, provides that suits may be instituted in the manner provided by the Urgent Deficiencies Act of October 22, 1913 to enjoin, set aside, annul or suspend "any order of the Commission under this Act", with five specific exceptions.

Section 402(b) provides a different procedure to be followed when the Commission's order is one of the five

types specifically excepted from the provisions of Section 402(a), i. e., orders (1) granting or denying applications for radio station construction permits, (2) granting or denying applications for radio station licenses, (3) granting or denying applications for modification of an existing radio station license, (4) granting or denying applications for renewal of an existing radio station license, or (5) suspending a radio operator's license. In these five cases, and only in these five cases, judicial review is to be obtained by an appeal to the Court of Appeals of the District of Columbia, with ultimate resort to the Supreme Court on writ of *certiorari*.

The reason for this differentiation has recently been stated by this Court in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 10 U. S. Law Week 4322 (April 6, 1942), wherein it was said with reference to these two sections, at page 4324:

“* * * But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under §402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under §402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in

situations where the Commission's order arose out of a proceeding not instituted by the licensee."

That the reviewability of an order under Section 402(a), as distinguished from 402(b), does not depend upon whether the order relates to an exercise of the licensing power is also shown by the fact that orders relating to revocation and transfer of licenses are admittedly reviewable under Section 402(a). See *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, *supra*, at page 4323; cf. *Federal Communications Commission v. Columbia Broadcasting System of California, Inc.*, 311 U. S. 132 (1940).

The District Court's misunderstanding of the line of demarcation between Section 402(a) and Section 402(b) is evident from the following statement from the majority opinion:

" * * * Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a 'station' applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word 'order' in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such 'orders.' " (R. 437)

The Order

The Order of the Commission here in question is an "order" adopting special regulations applicable to all radio stations engaged in chain broadcasting. It was made after extended hearings, argument on tentative regulations and the adoption of the Commission's Report on Chain Broadcasting. This entire proceeding was initiated by the Commission on its own motion.

The enacting clause of the Order of May 2, 1941 (omitted in the text of the Order annexed to the opinion of the lower court) reads as follows:

"WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity';

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission';

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached:

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:"

There follow eight particularized regulations of general application to all standard broadcast stations. Six of the regulations were directed against certain clauses in the network affiliation contracts. The Order distinguished between future and existing contracts and purported to become effective immediately with respect to the making of new affiliation contracts or the renewal of expiring ones. With respect to existing contracts, the regulations were ultimately made effective on November 15, 1941. The effective date of the other two regulations, dealing with the ownership and operation of networks and particular stations, was postponed "in order to permit the orderly disposition of properties."

When the Order is viewed in the light of the statutory scheme of review created by Section 402 of the Act, it appears to come squarely within the provisions of Section 402(a) and to have no recognizable relation to any of the orders reviewable in the manner provided by Section 402(b). It is beyond question that the Order neither grants nor denies any license of any kind, nor does it modify any license.

Adoption and Effect of the Order

The procedure leading to the adoption of the Order and the damage it has caused only serve to confirm this conclusion. This procedure is outlined in full in the Commission's Report (R. 37) and in the affidavit of Telford Taylor, Esq., submitted in support of the motion to dismiss the complaint (R. 376). Everything that was done was directed at the formulation of "special regulations" of general signifi-

cance to the industry, applicable on and after a certain date to all radio stations engaged in chain broadcasting.

The damaging effect of the Order is alleged in the complaint (R. 16) and is supported by the affidavit of Frank E. Mullen submitted in opposition to the motion to dismiss (R. 405). The making of the Order had the direct effect of causing stations to refrain from entering into standard affiliation contracts with NBC when they would otherwise have done so.* Because of the Order a substantial number of stations having existing contracts of affiliation with NBC served notice of abrogation of their respective contracts as of the effective date of the regulations as expressed in the Order.

The Commission Seeks to Avoid Normal Review

An exercise of the rule-making power by the Federal Communications Commission, such as the present Order, is normally reviewed under Section 402(a) (*American Telephone & Telegraph Co. v. United States*, 299 U. S. 232 (1936)), and similar exercises of power by the Interstate Commerce Commission are normally reviewed under the Urgent Deficiencies Act (*The Assigned Car Cases*, 274 U. S. 564 (1927); *United States v. Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935); see *Lambert Run Coal Co. v. Baltimore & Ohio R. R.*, 258 U. S. 377 (1922)). The Commission here seeks to avoid this normal course of review.

The position taken by the Commission is unusual and it should be prepared to establish that position with unusual force. There are a number of cases in which private parties have sought to establish that action which did not have the form of an order, such as a report, should, because of its substantive effect, be regarded as a reviewable "order" within the meaning of the Urgent Deficiencies Act. So far as we are aware, this is the first case in which a Commis-

* An important fact completely overlooked by the District Court.

sion, being fully cognizant of the alternative methods of expressing its views by means of opinions, reports, press releases, or many other procedures, has drafted an "order" promulgating regulations, and then has come into court to urge that in spite of its studied use of the formal procedure, its action should not be reviewed in the normal manner.

Since in the case at bar it is the Commission that seeks to go behind the face of the Order and to deny its apparent meaning, the Commission must bear the burden of overcoming the presumption that it meant what it did. This burden is particularly onerous in view of the fact that a large number of individual stations subject to the Commission's jurisdiction took what it did at face value and served notices of abrogation of valuable affiliation contracts and refused to enter into new contracts as of the effective date of its Order. Yet its disclaimer of having promulgated *bona fide* regulations is based upon verbalism.

In the court below, the Commission's only answer to the fact that the Order seems plainly reviewable under Section 402(a) was by way of confession and avoidance. Granting all we have said, the Commission urged that the Court should pay no attention to the fact that its Order is in form an order promulgating special regulations nor to the fact that radio stations have acted upon the Order as of its effective date. It objected that because the Order of May 2nd contains the words "no license shall be granted to a standard broadcast station" having certain relationships, rather than the language of the draft regulations, "no licensee of a standard broadcast station shall enter into" such relationships, review under Section 402(a) is no longer available.

Because of this change in wording, the Commission argued that the regulations are not "in substance" regu-

lations reviewable under Section 402(a) but are regulations which amount to nothing more than an announcement of licensing policy and are reviewable only under Section 402(b) of the Act.

This argument is in reality an attempt to pervert an unimportant matter of form into a crucial matter of substance. Every relevant fact leads to the conclusion that the Commission intended to and did promulgate regulations which both in substance as well as in form are of the type reviewable under Section 402(a).

II

Every substantive characteristic of the Order shows that it is reviewable under Section 402(a) of the Act.

The Investigation

The Commission initiated and conducted its investigation of chain broadcasting upon the basic theory that regulations could be devised which would be equally applicable to all stations engaged in chain broadcasting. The Commission's order No. 37, which instituted the investigation commenced as follows:

"WHEREAS, under the provisions of section 303 of the Communications Act of 1934, as amended, 'the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting'; and

"WHEREAS, the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, mul-

multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; NOW THEREFORE,

"IT IS ORDERED, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; * * *

There then followed a list of thirteen specific matters industry-wide in scope to be included in the inquiry with the statement that all other pertinent related matters would be covered (R. 131).

The only reasonable explanation for this industry-wide investigation is, that the Commission was interested in the problem on an overall basis and this is significantly illustrated by the fact that, although licensees were asked to give information by questionnaire and some attended the investigation, most of the information desired by the Commission was supplied by the nation-wide network organizations at the request of the Commission.

The inclusive scope of the investigation is fully reflected in the Commission's Report on Chain Broadcasting (R. 37) and the recitals contained in the affidavit of Telford Taylor, Esq., submitted in support of the motion to dismiss the complaint (R. 376).

The Regulations

The draftsmanship of both the tentative and the final regulations is in complete accord with the purpose of the investigation as above stated. The theory of both was

not that any particular station but that all stations engaged in chain broadcasting should no longer have or continue to maintain contracts containing certain specific clauses. There is a single exception which only serves to demonstrate the truth of this fact. Regulation 3.106 provides in part:

"No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, * * * for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. * * *"
(R. 128)

This part of regulation 3.106, unlike the rest of the Order, did not purport to set up a specific automatic standard but instead expressly referred to criteria the effect of which could only be determined case by case, with reference to the facts shown in particular cases. It is possible to regard this part of regulation 3.106 as in substance nothing more than a declaration of licensing policy to guide the discretion of the Commission in adjudicating the public interest in specific cases. But none of the other regulations is of the same character nor can they be interpreted to mean what they say if they are to be applied to only one, or several, or any number of stations less than all. None of them leaves room for the exercise of administrative discretion in specific cases. Instead they prescribe specific prohibitions which are automatically operative and can be checked by the clerical staff.

If at the conclusion of its investigation and the completion of its Report the Commission had been unable to reach a final determination and desired to await an investigation into the facts of individual cases before making up its mind, it should have refrained from taking any further action. Its promulgation of regulations was an affirmation that a binding general rule is the appropriate method of dealing with chain broadcasting.

This affirmation had sufficient force to cause radio stations variously situated to act upon it immediately.

Reliance on Section 303(i)

One certain indication that the Commission's determination of policy is final is furnished by the fact that the Commission embodied that policy in regulations promulgated under Section 303(i) of the Act. This was an exercise of the rule-making power, which is legislative in character and consequently may be finally exercised without attention to the facts of particular cases, as distinguished from an exercise of the licensing power conferred by Sections 307 and 309 of the Act which is exercisable only with respect to the facts of individual cases.

From first to last, the Commission has insisted that the Order was made under the rule-making power conferred by Section 303(i) and has argued both in its Report and in its brief in the court below that Section 303(i) contained a grant of substantive power separate and distinct from its licensing power and sufficient to sustain the Order even in default of power based on the Commission's authority to grant or deny licenses. For example, the Commission stated in its Report:

"If any doubt exist as to the propriety of the regulations viewed as an exercise of the Commission's licensing power, they are completely dispelled

by section 303(i). This section gives to the Commission the specific power to 'make special regulations applicable to radio stations engaged in chain broadcasting.' *No language could more clearly cover what we are doing here.* * * * (R. 121.)

And in its brief in the court below, the Commission said (p. 37):

"The words of Section 303(i) are plain and unambiguous. The regulations here attacked are clearly regulations 'applicable to radio stations engaged in chain broadcasting,' and as such are expressly authorized."

Inclusion of Announcement of Licensing Policy Immaterial

We need not dispute the Commission's insistence that the Order contains an announcement of licensing policy. That is a fact but it is not the significant fact in this case. All of the Commission's regulations dealing with radio are expressive of its licensing policies under the Act, but it is doubtful that even the Commission would contend that none of its regulations is reviewable under Section 402(a) and all must be reviewed under Section 402(b) for that reason alone. The only legitimate reason why review of an announcement of licensing policy should be delayed until the Commission acts in a licensing proceeding is that something remains to be done in that licensing proceeding with respect to the policy itself. If, however, the policy has been so finally determined upon as to take the form of a regulation, there is no reason why it should be reviewable only on appeal from a licensing proceeding.*

* Although judicial review of otherwise final administrative action is sometimes made conditional upon an application for a rehearing, we know of no rule of law requiring the seeking of an amendment after rehearing has been had.

The fact that the administrative process has come to rest with respect to these regulations is demonstrated by the following statements contained in the formal conclusions to the Commission's original Report:

"The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.

"We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market" (R. 124).

The Order is Enforceable Apart from License Renewal Proceedings

It is apparent that the regulations promulgated by the Order must be complied with by licensees and are enforceable apart from license renewal proceedings. The Commission itself has insisted that failure to comply with them would justify revocation proceedings. The Commission's power to impose this administrative sanction arises under Section 312(a) of the Act, which provides in part:

"Any station license may be revoked . . . for violation of or failure to observe . . . any regulation of the Commission authorized by this Act . . ."

The Commission's interpretation of the regulations as justifying the bringing of revocation proceedings under this Section is disclosed by the testimony of Chairman Fly when he appeared for the Commission at hearings before the Senate Committee on Interstate Commerce and stated:

"Mr. Fly. You are assuming that a station violates these rules and makes a 5-year exclusive contract with a network?

"Senator Bone. That is right.

"Mr. Fly. We will assume that. The first thing that happens is that the Commission, following the pattern of the statute, sets in motion administrative procedure: *The Commission issues an order of revocation*" (*Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941), p. 32*).

Again, as recently as in its main brief (p. 11, fn.) before the District Court, the Commission stated:

"In the event that the Chain Broadcasting Regulations are not complied with, the Commission could proceed against licensees either by revocation hearings or by setting their licenses down for hearing on renewal. As indicated in the Commission's Minute of October 31, 1941, the latter procedure will be followed."

The Commission's disclaimer of a present intent to apply this administrative sanction is unimportant. What is important is the interpretation of the substantive meaning of the regulations contained in these statements. The fact that licensees are expected to comply with the regulations, as such, shows beyond any possibility of contradiction that the Commission itself regards them as substantive regulations which can be violated by licensees in such manner as to justify revocation proceedings for such violation.*

* Violators would also be subject to criminal penalties, since the Communications Act of 1934 imposes criminal sanctions upon persons who willfully disregard regulations of the Commission. Section 502 of that Act provides in part:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offence occurs."

The view that the Commission intended to and did promulgate enforceable regulations to be obeyed by stations as of their effective date is fully supported by internal evidence in the regulations themselves, as well as by external evidence consisting of the Commission's own explanation and interpretation of the regulations.

Internal evidence of the mandatory nature of the Commission's regulations is furnished by the amendment to regulation 3.102 which was promulgated on October 11, 1941. Prior to amendment, regulation 3.102 provided:

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization."

On October 11, 1941, with the avowed purpose of clarifying the meaning of the foregoing regulation, the Commission added the following sentence thereto:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

With respect to this amendment, the Commission stated in its Supplemental Report (R. 205):

"This sentence does not change the meaning of Regulation 3.102 but is intended to eliminate con-

fusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area."

It is the plain meaning of this language that in the absence of the conditions set out in the amendment the regulation is to be construed to prohibit agreements of the type described therein.

At no time has the Commission offered a reasonable explanation of why, if its Order constituted nothing more than a bare announcement of policy, the Order distinguished between future and existing contracts, arrangements and understandings and why the effective date of the Order was expressly postponed "with respect to existing contracts, arrangements or understandings." The Commission has equally failed to explain why the effective date of Sections 3.106 and 3.107 of the Order needed to be postponed "in order to permit the orderly disposition of properties" if the Order were nothing more than a simple announcement of licensing policy.

The Commission's meticulous postponements of effective date following the adoption of the original Order of May 2, 1941 are described in the affidavit of Telford Taylor, Esq., submitted by the Commission in support of its motion to dismiss. Thus, it is there stated:

"The effective date of the regulations was deferred for 90 days from the date of the order *with*

respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104" (R. 378).

Further evidence of the Commission's plain intent that its regulations be complied with as regulations, and not as conditional announcements of policy, is found in the testimony given on its behalf before the Senate Committee on Interstate Commerce by Chairman Fly, who characterized the Order in the following language:

"Mr. Fly: . . . It is no more a regulation of the freedom of business than a decree of a court. No one has ever asserted, for example, that a decree of a court, breaking down certain restraints of trade, is in itself a regulation of the business. Yet this is the very sort of decree that a court charged with the duty of interpreting the antitrust laws by way of equity injunction, would write" (Hearings, supra, p. 68).

The Commission cannot maintain that the foregoing, although made prior to the adoption of the Commission's

"minute", represents a discarded policy. For after the adoption of the "minute" and under a letter of transmittal, dated December 15, 1941, the Commission sent to the Congress its Seventh Annual Report in which the regulations are discussed (pp. 22-23) without any suggestion that they constitute a tentative "announcement of policy." For example, with reference to option time (regulation 3.104), the Seventh Annual Report states:

"Under the May 2d regulations, such time options were not permitted. The October 11th regulations modified this ban to permit nonexclusive options during certain hours. Under the regulation as modified, the station may option a certain portion of its available hours Under both the May 2d and the October 11th regulations, networks remain free to purchase as much time outright as they care to use."

Other regulations are discussed in the same way.

Further, even apart from these characterizations of the Order by the Commission itself, under Section 309(b)(1) of the Act, all broadcasting licenses are granted by the Commission with the following condition contained therein:

"The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience or necessity to the full extent of the privileges herein conferred."

A determination of the public interest by the Commission is a condition precedent to the issuance of any regulations by it. Consequently, the regulations *per se* have the effect of exposing licensees who continue to operate under existing network contracts not only to the hazard of revocation proceedings under Section 312(a) of the Act, authorizing such proceedings "for failure to operate substantially

as set forth in the license", but also to criminal penalties provided in Section 502 of the Act for violation of a "condition" made or imposed by the Commission under the authority of the Act.

The Commission's decision to put its conclusions into an order promulgating definitive regulations, to limit carefully the effective date of its Order and to justify its action under the substantive rule-making authority granted by Section 303(i) of the Act is sufficient, in spite of the words "no license shall be granted", to sustain the validity of the network affiliates' interpretation of the Order as fully operative as of its effective date. The Commission's argument that the phraseology "no license shall be granted" deprives its regulations of meaning or effect until a specific license renewal proceeding arises simply cannot be reconciled with the substantive facts.

One example will illustrate the conflict between the legal argument which the Commission makes for the purposes of this action and the substantive position it takes with respect to the meaning and effect of its Order. At present, radio station licenses are granted for two-year periods. If the regulations amount to nothing more than an announcement of action which the Commission may, or may not, take in a license renewal proceeding, then it would be possible for a licensee to obtain a license for two years upon showing that the terms of its network affiliation contract do not conflict with the regulations, or that it has no contract at all, and, the next day, to enter into a network affiliation contract containing all of the clauses prohibited by the regulations. If the regulations are to be regarded as ineffective except in license renewal proceedings, the Commission would do nothing to compel such licensee to comply with the regulations save to set the license for hearing at the end of the

second year. That this is not the substantive intent of the regulations and that the Commission would issue an order revoking such license is apparent on the face of the record.

The Fact that the Order is Negative In Form and is in Terms Directed to the Commission Does Not Affect Review under Section 402(a).

Prior to the decision in *Rochester Telephone Corporation v. United States, et al.*, 307 U. S. 125 (1939), there was a body of law to the effect that an order having negative characteristics might not be reviewable under the Urgent Deficiencies Act and related statutes, but that case finally disposed of the notion that there is anything determinative about the fact that an order may have negative characteristics.

The only significance that remains to the phraseology "no license shall be granted" is the fact that the regulations are in terms directed to the Commission itself rather than to the licensees or to the networks. That this factor is equally lacking in significance was decided in *Powell v. United States*, 300 U. S. 276 (1937). In that case the Interstate Commerce Commission issued an order which, like the present Order, was in terms directed solely at the Commission itself. It merely directed that a tariff filed with the Commission by a carrier be stricken from the Commission's files. That order was held reviewable under the Urgent Deficiencies Act upon the ground that under all existing circumstances it in effect directed the carrier not to give the service covered by the tariff. The Supreme Court stated at pages 284-5:

"The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute. They do not sug-

gest that the order is a negative one or that the commission did not make an utterance which in form purported to be an order. But they say that it is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance 'except as a record of a certain completed act performed by the Commission.'

"But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. The tariff was a rule binding the Seaboard to furnish transportation to and from the fort for charges under other tariffs applicable to and from the junction. The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date. In effect the order grants the relief sought by the Central's complaint; it confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing, transportation to and from Fort Benning. Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute."

Similarly in the instant case the Order of the Commission is in substance and effect directed to the licensees and the networks, and is reviewable as such under Section 402(a). The Commission's disclaimer solely for the purposes of suit should no more be accepted in this case than in the *Powell* case.

III

The Commission's "minute" affords no reasonable basis for substituting Section 402(b) for Section 402(a).

The Commission's Order here in question is an "order" made under Section 303(i) of the Act promulgating definitive regulations applicable to all stations engaged in chain broadcasting and enforceable under the Act by both administrative and statutory sanctions. It was preceded by a legislative investigation extending over a period of three years, on the basis of which the Commission concluded that it was sufficiently informed to make an unconditional determination that the public interest, convenience and necessity required that no station engaged in chain broadcasting maintain a network affiliation contract containing certain specific clauses. It was followed by a rehearing wherein the Commission's lack of power to take this action under Section 303(i) or any other part of the Act was again urged upon the Commission. The only result was an amendment to the Order, equally precise and equally unconditional.

The Order, both in form and in substance, is of the type that is normally reviewable under Section 402(a) of the Act as shown by the forepart of this brief. The only remaining question is whether the "minute" adopted by the Commission after the filing of the present action under Section 402(a) affords a reasonable basis for determining that the possibility of reviewing the Order under Section 402(b) should displace the normal procedure for review under Section 402(a).

In the "minute," the Commission proposes to set for hearing the license of any station which wishes to contest

the validity of the chain broadcasting regulations or the reasonableness of their application to that particular station. Stations are informed that if they engage in such litigation their particular licenses will be temporarily extended during the litigation and that their licenses will be renewed even though they are unsuccessful in such litigation, so long as such stations thereafter conform to the regulations. The Commission also states therein that the adoption of the "minute" is without prejudice to the rights of any person who might petition the Commission for a modification or stay of the chain broadcasting regulations.

It is apparent on the face of the Commission's "minute" that it does not operate to change the form or the substance of the Commission's Order. The regulations are referred to therein as definitive, enforceable regulations. The issues which the "minute" suggests be raised with respect to them are issues appropriate to a test of any binding regulations—their validity, the reasonableness of their application to a particular case, and the question as to whether they should be amended. The "minute" concludes with the reminder that, notwithstanding its adoption, an application to the Commission for a stay of the enforcement of the regulations would be appropriate.

It is equally apparent on the face of the "minute" that the Commission would prefer to have it decided that the possibility of reviewing its Order under Section 402(b) displaces the normal procedure for review under Section 402(a).

It is difficult to see why the Commission feels compelled to take this view. Certainly in the absence of any legal difficulty an action under Section 402(a) is in every way a more practical and efficient method for reviewing the Order of the Commission here in question than an appeal

under Section 402(b) of the Act: The Commission's Order resulted from its legislative investigation into the conduct of chain broadcasting which was industry-wide in scope and was concerned with the contractual and other relations between network organizations and their affiliated stations as a whole, rather than with the circumstances of individual stations or groups of stations. The major portion of the time of this investigation was allotted to the hearing of testimony and the receipt of exhibits submitted by the nation-wide network organizations.

The Commission's Report itself is chiefly devoted to a discussion of existing network organizations and refers to the circumstances of individual stations only in so far as they demonstrate the validity of propositions relating to the conduct of network broadcasting as a whole.

The plaintiffs in the present action brought under Section 402(a) consist of NBC, one of the three nation-wide network organizations (at the time suit was brought), and the owners of two of its affiliated stations, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company. In a companion case, also brought under Section 402(a), the Commission's Order is attacked by Columbia Broadcasting System, Inc., the second of these three nation-wide network organizations. Mutual Broadcasting System, Inc., the third, has intervened on the side of the defendants in both cases.

The present action is ideally fitted for the determination of the issues relating to the power of the Commission to make its Order, which relate not to the special circumstances of one or more individual stations, but to the conduct of network broadcasting on a nation-wide basis.

Review Under Section 402(b) Is Not Appropriate for the Issues

If the Commission itself found licensing proceedings an inappropriate procedure for the formulation and promulgation of regulations, or "policies," affecting the industry as a whole, it seems reasonable to suppose that such licensing proceedings will be equally inappropriate for the review of such regulations or "policies."

Licensing proceedings are focused upon the question whether a particular license application should be granted on the basis of the facts relating to the individual application. The original parties in such a proceeding would consist only of the station applying for a renewal of its license and the Commission. Even assuming that NBC as a network organization and interested stations are permitted to intervene in a specific licensing proceeding,* the

* The Commission takes the position that no one has a right to intervene in such a proceeding and that intervention will be allowed only "to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions." Thus, in *In Re Matheson Radio Co., Inc.*, Pike & Fischer Admin. Law, §41g.23-1 (May 21, 1941), the Commission relied upon the following interpretation of Regulation 1.102 as quoted from one of its earlier decisions:

"The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. * * * The fact that a proposed intervenor may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. * * * By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the

primary issue would be the disposition which should be made by the Commission of the individual application. Infinite possibilities of a multiplicity of suits are presented by the necessity of resorting to that procedure.

In a number of licensing proceedings the Commission may be compelled to base its decision denying a particular license application upon the facts of the individual case apart from the Order. On an appeal from this decision under Section 402(b) the question of the Commission's power to make the Order would not be relevant.

If the Commission bases its decision partly upon the particular facts of the individual case apart from the Order and partly upon a violation of the Order, there is still no assurance that the appellate court in an appeal under Section 402(b) will review that part of the Commission's decision relating to the Order.

Even should the Commission decide solely upon the basis of the Order, the remedy by appeal under 402(b) is inadequate so long as the decision is based upon the application of the Order to the particular licensee. NBC would have to take an appeal from each separate license proceeding in order to protect the network, and even should it ultimately succeed, the network would be irretrievably destroyed long before the series of appeals under Section 402(b) had been completed, because of the continuing effectiveness of the Order as to all other affiliates not currently embroiled in litigation. The adequacy of that remedy depends upon the willingness of every affiliate to litigate the validity of the Commission's regulations in licensing

public will benefit through aid or assistance given to the Commission or the applicant by a party-intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102."

proceedings in spite of the attendant trouble, risk and expense.*

Under Section 309(a) of the Act the Commission is authorized to *grant* licenses without a hearing. If stations conform their contracts to the terms of the Commission's regulations in advance of application for license renewals and thereafter obtain such renewals from the Commission without hearing, the sole ground upon which NBC could apply to the Court of Appeals for the District of Columbia would be that it was a party aggrieved by the granting of the license. The obvious answer to an appeal of this character would be that the injury complained of resulted not from the granting of the license, but from the act of the station in conforming to the Commission's requirements, leading to the inevitable dismissal of the appeal. Exactly the same situation exists with respect to a station which has no affiliation contract.

It is true that a case may be postulated in which issues relating solely to the Commission's rule-making power might arise in a licensing proceeding. Such a case would be one where the Commission gave, as its sole ground for denying a license, the fact that the licensee had been guilty of a violation of the substantive rules contained in the Chain Broadcasting Regulations. Even in that case the network would be subject to irreparable injury pending the proceeding. This is so because the "minute" does not suspend the regulations but only gives immunity to par-

* Since the networks, as such, are not licensed by the Commission they cannot themselves institute license renewal proceedings. Although individual stations operated by the networks are licensed by the Commission, such stations (being directly operated) have no affiliation contracts and hence the networks cannot in license renewal proceedings with respect to those stations test the validity of the regulations relating to affiliation contracts.

ticular litigants. Again, those stations unwilling to bear the trouble, risk and expense of a license renewal proceeding would conform their contracts to the regulations and be lost to the network.

Moreover, no better case could be suggested to demonstrate the falseness of the issue which is raised by referring to the possible identity of the questions which might arise in an action under Section 402(a) and an appeal under Section 402(b). If the regulations constitute such an exercise of the rule-making power that violation thereof by the licensee would justify the Commission in denying a license on that ground alone, then such a violation on or after the effective date of the Order would expose such licensee to all of the administrative and statutory sanctions surrounding such substantive exercises of the Commission's rule-making power. The very action which the Commission would take in the licensing proceeding would demonstrate beyond question the character of its Order as an "order" within the meaning of Section 402(a) against which Congress has given a right of action under that section irrespective of any other methods of review which might exist.

Consequently, every practical consideration relating to the efficiency and completeness of the remedy to be afforded leads to the conclusion that the proper procedure in this case is that provided by Section 402(a) of the Act.

There Is No Policy Requiring Review Under Section 402(b)

It may be admitted that these practical considerations might not be controlling were there some overriding reason of policy requiring that the Order be reviewed in

individual license proceedings rather than by plenary suit under Section 402(a).

For example, when the Public Utility Holding Company Act was passed, the Securities and Exchange Commission sought, for compelling reasons of policy, to control the mass of expected litigation raising the constitutionality of the Act. The SEC would have been a defendant in all cases brought by private parties, and if all suits were allowed to progress at the same time it would have been the defendant in a multiplicity of suits. Therefore the SEC sought to stay all suits pending a decision on a case chosen by it. Moreover, the governing provisions of that Act were extremely general in character and it was important that the facts of the test case fill in the legislative outline in a reasonable manner. Therefore an attempt to control a test of the constitutionality of that Act on the part of the Government could be justified on the ground that such control was necessary to present a case possessing the proper factual background which would enable the courts more fairly to pass upon the constitutional questions involved as well as to avoid a multiplicity of suits.

There are no comparable reasons of policy in the present case. The regulations of the Commission here in question are definite and precise, they apply to chain broadcasting as a whole and nothing can be gained by an examination of the facts relating to a particular station's license application. It is 402(b) that may raise a multiplicity of suits and 402(a) that will avoid them.

The difference between the means adopted by the Securities and Exchange Commission to control the path of litigation with respect to the Public Utility Holding Company Act and the action taken by the Commission in this case is also instructive. There the Government sought to assure

all parties subject to the Act that they would not be exposed to its provisions pending the determination of the test case which had been chosen by the Government. The procedure there adopted was described by this Court in *Landis, et al. v. North American Co.*, 299 U. S. 248 (1936), at pages 251-252, as follows:

"Upon the argument of the motion the Attorney General and the Securities and Exchange Commission announced that until the validity of the Act had been determined by this court in a civil suit which would be diligently prosecuted, neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act, and that even after such determination they would not seek to exact penalties for earlier offenses. Written notice to that effect was given to all prosecuting officers. At the same time the Postmaster General announced that even if he had authority, he would not exclude any company from using the mails because of any violation of the Act pending the judicial determination of its validity by this court. Also, the Commission issued a regulation permitting a holding company, when registering, to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be adjudged invalid or ineffective. Finally, the Attorney General offered to submit to a temporary injunction restraining the enforcement of the Act until the Electric Bond and Share case should be determined by this court. On the other side, the plaintiffs offered to consolidate their cases and thus dispose of them as one. They also offered, as we were informed upon the argument, to select a group of suits, not more than three or four, to be tried at the same time, with the understanding that any others would then be held in abeyance. These offers were rejected, and the Government stood upon its motion."

In the *Landis* case there were compelling reasons of policy for controlling the course of review and the procedure adopted was directed solely toward that end.

Even though it could be assumed in the present case that the Commission is impelled by some reason of policy to avoid review under Section 402(a), the procedure it has adopted is not directed solely to that end. Its attorneys conceded in open court at the hearing on appellants' application for temporary relief pending appeal that it had expressly refused to grant a stay of the enforcement of its regulations pending a determination of its power in a test licensing proceeding and appeal therefrom under Section 402(b).

The difference between the protection afforded in the *Landis* case and that afforded appellants by the Commission's procedure in the present case cannot be bridged by the legal arguments of the Commission's counsel to the effect that its Order should be regarded as having no substantive effect. The Commission itself has been publicly announcing the contrary with such force and effect that appellants have already suffered serious injury. Nor can the Commission expect that its "minute" with its limited and special immunity be considered the equivalent of the complete waiver of enforcement made in the *Landis* case.

The Commission may be entitled to control its own procedure, but something more is involved in the present case than a battle of wits. The Commission is an administrative body charged with the regulation of radio broadcasting in the public interest, convenience and necessity. It cannot regard cancellations of network affiliation contracts and imminent danger to the conduct of nation-wide network broadcasting service with the equanimity indicated by its argument in the court below that these consequences of the Order should be regarded as immaterial.

The Commission has failed to show reasons either of practicality or of policy for its desire that its Order be tested only under Section 402(b) of the Act. Failing such reasons, and in the face of the conceded effect of its Order, it is apparent that the Commission seeks something more than orderly review. It wants the immediate obedience to its regulations which has resulted and will continue to result from the fact that the regulations are, both in form and in substance, definitive, enforceable regulations.

Conclusion

For these reasons, it is respectfully submitted that the decision of the District Court should be reversed and the cause remanded to that Court for consideration of the merits.

Respectfully submitted,

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APPENDIX A.

The Urgent Deficiencies Act.

(38 Stat. 219, 220; 28 U. S. C. Sections 41(28), 43 through 48, inclusive.)

SECTION 41. The district courts shall have original jurisdiction as follows:

(28). Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 43. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

§ 44. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set

aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States.

§ 45. The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court.

§ 45a. The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this Title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided, further*, That communities, associations, corporation, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said

intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

§ 46. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

§ 47. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would other-

wise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

§ 47a. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general

of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

§ 48. All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made party, public interests are involved.

The Communications Act of 1934.

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of

Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon,

and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant and/or other interested parties intervening in said appeal, but not

against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

SEC. 4 . . .

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any

regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

Sec. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs.

APPENDIX B**BEFORE THE****FEDERAL COMMUNICATIONS COMMISSION****Washington, D. C.****Commission Order in Docket No. 5060.****In the Matter of the Investigation of Chain Broadcasting
May 2, 1941**

WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity;"

WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

3.101 No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

standing, express or implied, with a network organization¹ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: Provided, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

¹ The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

3.105 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106 No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control² with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107 No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108 No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

² The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

standing, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. Slowie, *Secretary*.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

October 11, 1941

Order.

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

IT IS ORDERED, That the Commission's order of May 2, 1941, entered in Docket No. 5060, BE, AND THE SAME IS HEREBY, AMENDED in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first

call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours² within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder

¹ As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

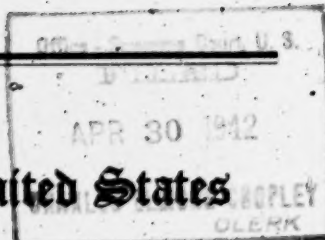
the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

T. J. SLOWIE,
Secretary.

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF
THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-
CARLSON TELEPHONE MANUFACTURING COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS.

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson Tele-
phone Manufacturing Company.*

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vs.

UNITED STATES OF AMERICA and the FEDERAL
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MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

The narrow scope of the question for decision by the Supreme Court upon this appeal, as stated in appellants' main brief (Br. 17-18), is fully confirmed by the brief filed by the government. It is expressly conceded by the government that the Chain Broadcasting Regulations promulgated by the Commission's Order are reviewable under Section 402 of the Communications Act of 1934 (Br. 55, 39-40) and it addresses itself to the single point at issue, that is,

whether the proper procedure for such review is that provided by Section 402(a) of the Act, as contended by appellants, or that provided by Section 402(b), as contended by the government.

All of the salient facts showing that the Commission's Order is, on its face, an "order" promulgating regulations which is a proper subject for review under Section 402(a) are stated or conceded in the government's brief (Br. 5-7, 36, fn. 46, 43-44). The damaging effect of the Order is in no way denied, although the government seeks to dismiss it as an "incidental consequence" of the Order (Br. 41-44). The government goes so far as to concede that, save for an alleged lack of finality, the Commission's Order is an "order" within the meaning of Section 402(a) of the Act (Br. 48-49).

As pointed out in appellants' main brief (Br. 24), the government's sole argument in answer to the fact that the Order seems reviewable under Section 402(a) is based upon verbalism. The formalistic nature of the government's position is made clear by the following statement, to be found at p. 34 of its brief:

"If the Commission had not phrased its regulation in terms of 'no license shall be granted' licensees with network affiliation contracts would have been forced immediately to alter their contracts or be subjected to criminal penalties."

The proposition that the decision in this case should depend upon the turn of a phrase is ridiculous on its face, and the government's argument conflicts at every stage with the operative facts.

Not only does every substantive characteristic of the Order show that it is reviewable under Section 402(a) of the Act but the Order has had the direct and immediate effect

of causing many radio stations to abrogate their network contracts without regard to the times when their respective licenses expired (R. 16, 405-419). In addition, during the effective period of the Order as to new contracts between May 2, 1941 and November 12, 1941, NBC was completely unable to enter into new affiliation contracts, although both parties were ready, able and willing to do so except for the Order (R. 16).

The significant facts showing that the Commission's Order promulgated definitive, enforceable regulations so as to be, in substance as well as in form, an order of the character reviewable under Section 402(a) of the Act rather than under Section 402(b), are outlined in Point II of appellants' main brief (Br. 25-38).*

The government is unable to deny these facts and it is remitted to the argument that such facts should be regarded as immaterial despite the fact that they caused the abrogation of network affiliation contracts and forestalled new ones. Its argument should be rejected because it does not afford a reasonable explanation for the action taken by the Commission, the statements made by it, or the conceded effect which such action and statements have had.

The government makes much of the fact that the Order contains an announcement of licensing policy, but no valid conclusion as to the procedure by which the Order should be reviewed can be based upon that fact. All of the Commission's regulations dealing with radio are expressive of its licensing policies under the Act and may be enforced by

* The government inadvertently states (Br. 20) that NBC seeks to enjoin all eight regulations. The complaint clearly states that an injunction is sought only against those regulations which purport to have become effective on or before November 15, 1941 (R. 17). Since the effective date of regulation 3.107 was "suspended indefinitely" by the Order of the Commission of October 11, 1941, it is clear that NBC does not seek an injunction against that regulation.

denials of applications for license renewals. This is as true of the regulations enumerated at p. 35, fn. 45, of the government's brief as of the regulations enumerated in fn. 44 on the same page.

The true question for decision by this Court is whether the regulations should, under all the circumstances, be regarded as sufficiently definitive to justify their review under Section 402(a) rather than under Section 402(b). Both the facts and the authorities cited in the government's brief, as distinguished from the conclusions which the government seeks to draw from them, lead to the determination that it should.

Factors which demonstrate the definitive character of the Commission's Order (appellants' main brief, 25-30) are conceded by the government. It expressly concedes that the Commission's Order was preceded by an investigation of "wide scope and thoroughness" (Br. 36) to enable the Commission to be fully informed, that the regulations are "phrased precisely" (Br. 36, fn. 46), and that the Commission in promulgating the regulations relied, as a source of power, upon Section 303(i) of the Act which authorizes the Commission to make "special regulations applicable to radio stations engaged in chain-broadcasting" (Br. 36, fn. 46).

The government's suggestion (Br. 36, fn. 46) that the precise phraseology of the regulations is meaningless because their application is subject to the general standard of "public interest, convenience or necessity" is astonishing both in view of the fact that the Commission is without power to promulgate any regulations unless it has determined that they accord with such standard and in the light of the findings regarding the public interest scattered throughout the Commission's Report (*e. g.*, R. 113, 115, 118, 121, 122) and referred to in the government's brief (Br. 17).

Appellants have no quarrel with the government's suggestion that it is desirable for administrative agencies to make announcements of general policy rather than to limit themselves to a case-by-case development of policy (Br. 29, 57). The Commission may well announce general policies by informal press releases, speeches of its members and, perhaps, even by formal orders and regulations. But the suggestion relates to an announcement of *general* policy. It assumes that the policy so announced will serve as a general guide and will leave the Commission free to make determinations in individual cases on the basis of evidence and argument presented in those cases, both as to the validity or reasonableness of the policy and to its relevance in the particular situations.

But here we are dealing not with a statement of general policy, but with a rule of thumb. It is not stated in the other regulations, as it is in regulation 3.106, that the Commission will scrutinize affiliation contracts to see whether they substantially restrain competition. On the contrary, it is specifically stated that an exclusive option contract will disqualify a broadcast station.

If the Commission had meant to leave its discretion in the matter in future cases, it might have merely published its Report in which its point of view was generally stated, or it might, in the regulations themselves, have stated general standards as it did in Section 3.106, or have otherwise indicated that it would consider cases individually and exercise discretion on the basis of some general standard. None of these things did the Commission do. And it did not do them, presumably, because it had definitely made up its mind once and for all, for this station and for that, that the particular type of affiliation contract described in the regulations must go.

With respect to the enforceability of the regulations, the statement is made by the government in the body of its brief

at page 33 that the regulations need not be complied with by licensees and are not enforceable in revocation proceedings. This statement is immediately withdrawn in a footnote appearing on the following page. In the hearings before the Senate Committee on Interstate Commerce and in its brief in the court below, the Commission conceded that revocation proceedings could be instituted under Section 312(a) of the Communications Act for non-compliance with the regulations (appellants' Br. 30-31). It now denies that revocation could be based upon that ground but concedes that it would be appropriate under another portion of Section 312(a) (Br. 34, fn. 43). The result is the same. The Commission's regulations are enforceable by revocation proceedings.

The government seeks to distinguish such cases as *American Telephone & Telegraph Company v. United States*, 299 U. S. 232 (1936), on the ground that in those cases the regulations had to be complied with and gave rise to penal sanctions for their violation or for violation of the statute (Br. 37, *et seq.*). The attempted distinction is unsound, for, as pointed out in appellants' main brief (Br. 30-36), the Commission's regulations must be complied with by licensees at the risk of the administrative sanction of revocation as well as the penal sanction provided by Section 502 of the Act.

Again, the primary characteristic of the government's argument is its reliance upon technical distinctions. It disregards the fact that the governing question is not the precise nature of the sanction that causes irreparable injury in a particular case, but whether under all the circumstances it is reasonable to conclude that irreparable injury is a natural consequence of the order under consideration.

Certainly, *Rochester Telephone Corporation v. United States, et al.*, 307 U. S. 125 (1939), and *Powell v. United*

States, 300 U. S. 276 (1937), discussed at page 37 of appellants' brief, indicate that this Court has treated this question with a real regard for the substantive core of the problem, which it has traced through widely varying fact situations.

Appellants do not contend for a moment that all regulations of the Commission should be reviewed under Section 402(a) any more than all congressional legislation should be reviewed by injunction against the enforcing officer. Of course, before an injunction can issue a plaintiff must show not merely that he is affected by the statute but also that he would suffer irreparable injury if he were remitted to remedy other than by injunction. In the case at bar, there has been no determination that an injunction would be inappropriate as a matter of equity jurisdiction. Indeed, the opinion of the court below indicates that a bill in equity for injunctive relief in a one-judge court would be appropriate.

The government relies heavily upon the "minute" adopted by the Commission following the institution of the present suit as justification for its contention that Section 402(b) rather than Section 402(a) is the proper procedure for review of the Order. It states that the Commission "particularized the procedure with respect to hearings involving questions under the Chain Broadcasting Regulations by its Minute" (Br. 25-26).

It can scarcely be contended, however, that such particularization should be accepted by this Court as an adequate substitute for the expressed intention of Congress that all orders of the Commission should be reviewed under Section 402(a) except only the five specific types reviewable under Section 402(b). There is nothing in the "minute" that operates to change the form or the substance of the Commission's Order as an order promulgating definitive,

enforceable regulations which, like all regulations, are subject to amendment and stays of their enforcement.

The government's failure to point out any substantive questions remaining for determination by the Commission in license renewal proceedings and its arguments touching the appropriateness of Section 402(b) as a method for reviewing the Order leave unanswered the question of why the remedy under Section 402(b) is advocated so insistently.

One suggestion made in the government's brief is that the Commission may in some cases waive the regulations and grant renewal applications, although the Commission concedes in its brief that the regulations will in all probability be applied according to their terms in the absence of special circumstances (Br. 28, 55, 60, fn. 66, cf. 54).

Although it is difficult to understand how regulations of such irregular application could "serve as a guide to applicants and other interested parties" (Br. 53), the net result of admitting such a possibility will be the conclusion that the chances of obtaining expeditious review of the Commission's power to make its Order under Section 402(b) are even less than was suggested in appellants' main brief (Br. 42-45).

Moreover, waivers or exceptions will be of no service to NBC, which requires the co-operation of substantially all of its affiliated stations in order to carry out its function of furnishing a nation-wide network broadcasting service. The government notes this claim (Br. 41) and it is significant that it does not attempt to deny that the operations of NBC will be disrupted as a consequence of the Order. Instead it solemnly suggests that any action in conformity with the regulations taken by NBC's affiliated stations which, prior to May 2, 1941, faithfully observed their contracts, would be taken by such stations "of their own choice" (Br. 42). It urges this Court to regard the resulting destruc-

tion of nation-wide network broadcasting services as an "incidental consequence" of the Order (Br. 43). A contention of this character ill-accords with the Commission's duty to foster the broadcasting services of this country in the "public interest, convenience or necessity" (see Sections 303, 307 and 309 of the Act) or with the general purposes of the Act (Section 1):

"To make available, so far as possible, to all the people of the United States, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication * * *."

Another possibility suggested by the government to indicate the applicability of Section 402(b) is that the Commission may modify its regulations in subsequent licensing proceedings (Br. 55).^{*} The power to modify is co-extensive with the power to regulate and if the possibility of amendment precluded court review, no order promulgating regulations would ever be subject to judicial review.

The suggestion that the Commission might hold a hearing with respect to the applicability of the regulations to a licensee, which had conformed with the regulations in advance of application for renewal of its license (Br. 41-42) has no relation whatever to the appropriateness of Section 402(b) as a method of reviewing the regulations. In no event could such licensee be held to violate the regulations,

^{*} Cf. "Senator WHITE. I assume that if you have power to make these regulations you have the power to modify them and change them or to wipe them out in their entirety.

Mr. FLY. I do not so assume, sir, unless the modifications that we would make would be in accordance with the law, as these regulations are." (*Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941), p. 96*).

and this suggestion is the *reductio ad absurdum* of the government's argument that Section 402(b) is a readily available means for testing the legality of the Commission's Order. Consequently, the argument of convenience, if it is necessary to bolster the plain import of the statute that these regulations are reviewable under Section 402(a), is wholly on the side of appellants.

Finally, it should be pointed out that appellants are not seeking any advantage by review under Section 402(a). They are seeking here to avoid complete destruction of their business rather than to secure an unwarranted advantage in the selection of a case or a forum and they are not subject to criticism such as was leveled at the public utility holding companies with respect to the Holding Company Act.

As mentioned in the government's brief (Br. 45, fn. 50), after the District Court had rendered its opinion, appellants offered to the Commission, indeed requested the Commission, to select representative cases and proceed with them in licensing proceedings, provided only that enforcement of the regulations would be stayed for all cases. This the Commission declined to do despite the obvious fairness of the proposal.

On the whole record, it is impossible to escape the conclusion that the Commission is concerned with something more than a desire to have its Order reviewed in an orderly manner. The only explanation which fully accords with the facts is that the Commission wants the substantive advantage of definitive, enforceable regulations without the incidents of reviewability which normally are attached to such regulations.

It is submitted that the foregoing disposes of the points raised in the brief filed by the government. It also disposes

of Point I of the brief filed on behalf of the Intervenor, Mutual Broadcasting System, Inc. (MBS), which is in substance the prematurity argument made by the government although it is incorrectly phrased in terms of the doctrine of "primary jurisdiction".

Points II and III of the MBS brief are devoted to the proposition that no order which is legislative in character is properly subject to judicial review under the Urgent Deficiencies Act and that particularly no such order of the Federal Communications Commission is reviewable under Section 402(a) of the Communications Act of 1934. This argument is made at the expense of charging with error not only the appellants but also the majority and minority of the District Court, the Government and the Commission itself (MBS brief, p. 16).

Stripped of the verbiage with which it is adorned, this argument amounts to a plea that this Court rewrite the express language of Congress, contained in Section 402(a), that "any order of the Commission" is reviewable under Section 402(a) with the five specific exceptions described in Section 402(b), to conform to MBS' view of what Congress should have said, i. e., "any order of the Commission except orders which are legislative in character" are reviewable under Section 402(a) with the same five exceptions. The fallacy of this position cannot be avoided by redefinition of the meaning of "legislative orders" as urged by MBS (*Br. 19 et seq.*) nor by the device of classifying all contrary decisions of this Court as "exceptions."

The bland statement in the MBS brief (p. 3) that its claims to the effect service to the public has been impaired and revenue decreased to many broadcasters "have never been seriously controverted" should not pass unchallenged lest an erroneous impression be conveyed. A large portion

of the case on the merits relates to the matters thus so unceremoniously disposed of in passing. The facts are that the Commission's Report shows an enormous growth in MBS' business (R. 28). MBS, in soliciting advertisers, boasts of its competitive advantages in numerous markets (R. 357-359) and the theory that the public service is impaired by the contract provisions banned by the regulations has always been most seriously challenged in hearings before the Commission prior to the promulgation of the original Order on May 2, 1941, upon the rehearing of the Order on September 12, 1941, and in the District Court.

Conclusion

It is respectfully submitted that the decision of the District Court should be reversed and the cause remanded to that Court for consideration of the merits.

Respectfully submitted,

JOHN T. CAHILL,

*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,

*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,

*Solicitor for Stromberg-Carlson Tele-
phone Manufacturing Company.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN
OF THE WORLD LIFE INSURANCE SOCIETY and
STROMBERG-CARLSON TELEPHONE MANUFACTURING
COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

**MOTION FOR TEMPORARY RESTRAINING ORDER,
NOTICE OF MOTION AND AFFIDAVIT
IN SUPPORT OF MOTION.**

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson
Telephone Manufacturing Company.*

Supreme Court of the United States

OCTOBER TERM, 1941.

NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
and STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,

Appellants,

vs.

No. 1025.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

Motion for Temporary Restraining Order.

Upon the annexed affidavit of Frank E. Mullen, sworn to April 28, 1942, and all the other papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellants move this Court for a temporary suspension of the order of the Federal Communications Commission, one of the appellees herein, in Docket No. 5060, made May 2, 1941, as amended October 11, 1941, the order involved on this appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on this appeal, in order that the *status quo* may be adequately preserved; and for such other and further relief as to this Court may seem just.

Dated, April 28, 1942.

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson
Telephone Manufacturing Company.*

Supreme Court of the United States

OCTOBER TERM, 1941.

NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
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FACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

No. 1025.

Notice of Motion.

Sirs:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the pending appeal herein is called for argument,

at 12 o'clock noon on that day or as soon thereafter as the motion can be submitted.

Dated, April 28, 1942

JOHN T. CAHILL,
*Solicitor for National Broadcasting
Company, Inc.*

DAVID M. WOOD,
*Solicitor for Woodmen of the World
Life Insurance Society.*

THOMAS H. MIDDLETON,
*Solicitor for Stromberg-Carlson
Telephone Manufacturing Company.*

To:

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
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Supreme Court of the United States

OCTOBER TERM, 1941.

NATIONAL BROADCASTING COMPANY, INC., WOOD-
MEN OF THE WORLD LIFE INSURANCE SOCIETY
and STROMBERG-CARLSON TELEPHONE MANU-
FACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

No. 1025.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
CITY, COUNTY AND STATE OF NEW YORK, }

FRANK E. MULLEN, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc., one of the appellants herein. I am making this affidavit in support of appellants' motion to enjoin and suspend the Order of the Federal Communications Commission of May 2, 1941 (as amended October 11, 1941) which is the subject matter of the appeal now pending before this Court.

Original Effective Date of Commission's Order.

The Order of the Commission here in question originally provided that:

“ . . . these regulations shall become effective immediately: *Provided, That*, with respect to exist-

ing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

Postponements of Effective Date.

(1) On June 13, 1941 the original effective date of regulation 3.107 of the Order was changed by the Commission so that instead of becoming effective immediately (as provided in the original Order of May 2, 1941) such regulation became effective 90 days from May 2, 1941.

(2) On July 22, 1941, the effective date for the portions of the Order which were to have become effective on July 31, 1941 (that is, 90 days after the date of the original Order) was changed by an order of the Commission to September 16, 1941.

(3) On August 28, 1941 the effective date of the portions of the Order which were to have become effective on September 16, 1941 was again changed to an indeterminate date to be fixed by the Commission on and after September 12, 1941.

(4) On October 11, 1941 (after a rehearing on September 12) the Order, in so far as it had not already become effective on May 2, 1941, was made effective on November 15, 1941, except that regulation 3.107 was indefinitely suspended by the Commission, subject to being made effective on six months' notice.

(5) On October 31, 1941, after the commencement of this suit, the Commission partially suspended the effect of regulation 3.106.

The complaint in this action seeks an injunction suspending the Order only in so far as the Order purports to become effective on or before November 15, 1941.

Suspension of Commission's Order.

By stipulation of the parties and order of the District Court on November 12, 1941, the Commission suspended its Order until determination by the District Court of appellants' motion for preliminary injunction. At the same time it was informally agreed by letter between the appellants and the appellees that such suspension should be effective until ten days after service of an order of the District Court disposing of appellants' motion for a temporary injunction.

When the District Court dismissed the complaint on February 21, 1942, it held (R. 436) that there was jurisdiction in the Court of Appeals for the District of Columbia to review the Order under Section 402(b) of the Communications Act of 1934 in an appeal from a licensing proceeding (R. 436-438). When this determination was made by the District Court, counsel for appellants sought a stipulation from the Commission by which representative license renewal proceedings would be instituted to test the validity of the Order in that manner *provided the Commission would stay enforcement of the Order pending the determination of its validity in such licensing proceedings.* The Commission took the position that it would not suspend the Order pending the determination of cases arising under Section 402(b) of the Communications Act except as to an individual litigant.

When the Commission refused to suspend the Order pending proceedings under Section 402(b) of the Act except as to an individual litigant, appellants, within the ten-day period mentioned above, applied to the District Court for a stay of the Commission's Order pending the determination of this appeal. On March 2, 1942 the District Court entered an order restraining the Commission from enforcing its order *only* until May 1, 1942, or the argument of this appeal, whichever might be earlier. In granting this stay the District Court, in its *per curiam* opinion, stated:

"For any further stay the plaintiffs must apply to the Supreme Court itself or to the Circuit Justice."

In holding that appellants were entitled to a stay, the District Court, in its *per curiam* opinion, stated (R. 449-450):

"The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiff's favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first."

The Findings of Fact and Conclusions of Law upon which the action of the District Court was based are as follows (R. 450):

"FINDINGS OF FACT"

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon; did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier."

Necessity for Further Stay.

These Findings of Fact and Conclusions of Law of the District Court are fully supported by the affidavits of Niles Trammell, verified October 30, 1941 (R. 225-253), and my affidavit verified January 3, 1942 (R. 405-419), in the court below and reference to those affidavits is respectfully made in lieu of a repetition of such facts in this affidavit. The irreparable injury to appellants if the regulations are not suspended pending the determination of this appeal and for a reasonable time thereafter is as great now as it was at the time the above mentioned affidavits were made.

It is important to note that the effective date of the Order with respect to existing contracts was postponed by the Commission's own action from May 2, 1941, the date of the original Order until November 15, 1941, and that from November 12, 1941 until the present time all parts of the Order have been continuously enjoined or suspended either by action of the Commission or by Court order. It is only because of such suspensions that appellants have been able to continue their operations as heretofore (except that they have been able to make new contracts only since November 12, 1941).

The stay of the District Court is only until May 1, 1942 or argument of the appeal, whichever shall first occur. After the allowance of the appeal, appellants requested the Commission and the United States to enter into a stipulation which would suspend the Order of the Commission until ten days after the determination of the appeal. This they refused to do but they did enter into a stipulation with appellants on April 25, 1942 extending the suspension of the Order until determination of the appeal or the last decision day of this term of the Supreme Court, whichever is earlier. The text of the stipulation is as follows:

"IT IS HEREBY STIPULATED by and between all the parties by their respective counsel that:

"Until the last decision day of the October, 1941 term of the Supreme Court of the United States or

until the determination of the pending appeal in the above entitled case by said Court, whichever is earlier, the defendant-appellee Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, as last amended October 11, 1941, with respect to any failure by any radio station to comply with such order."

The Commission refused, however, to stipulate for the suspension of the Order for any period of time after the determination of the appeal or after the last decision day of the present term. Consequently, the appellants have no protection from the enforcement of the Order for any period of time after the determination of the appeal (or for any time after the end of the present term if the appeal is not decided at this term) to permit them to obtain appropriate stay of enforcement pending further action in the court below, if the appeal is decided in favor of appellants, or in some other forum if the appeal is decided in favor of the appellees. Furthermore, appellants and the hundreds of radio stations which are affected by the Commission's Order are not given any period of time whatsoever after the determination of the appeal to adjust their affairs to meet the requirements of the Order and to minimize the injury which will result on the day the present stay expires.

If the decision of the District Court is reversed, the appellants will apply to the District Court for a determination of their pending motion for preliminary relief and will seek from the District Court a temporary stay pending the decision of the District Court on such motion. This will naturally take a few days and the purpose of the present motion is to obtain the necessary time to make such an application.

If the decision below is affirmed, it will be necessary for appellants to pursue such other remedy as may be available. If no other remedy can be obtained, it will be necessary for

the networks to modify existing contracts. In the case of National Broadcasting Company, Inc. this will involve approximately 76 stations; in the case of Columbia Broadcasting System, Inc., approximately 115 stations will be involved; and in the case of Blue Network Company, Inc., approximately 103 stations will be involved.

Ten days after filing of the mandate is the very minimum period of time which National Broadcasting Company, Inc. will need.

The pressing need of appellants for a stay until the filing in the District Court of the mandate upon this Court's decision on this appeal, and for a period of ten days thereafter, is to be contrasted with the lack of any showing by the appellees of any urgent public interest. The District Court pointed out in its Findings of Fact (R. 450):

"III. That the Commission, in the hearings leading to said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest."

WHEREFORE, appellants pray that this Court enter an order granting the relief set forth in the accompanying motion.

Frank E. Mullen

(FRANK E. MULLEN)

Subscribed and sworn to before me }
this 28th day of April, 1942.

Florence E. Marger

Notary Public.

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30 1942
Nos. 1025-1026

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1025

NATIONAL BROADCASTING COMPANY, INC., WOODMEN
OF THE WORLD LIFE INSURANCE SOCIETY AND
STROMBERG-CARLSON TELEPHONE MANUFACTURING
COMPANY, APPELLANTS

THE UNITED STATES OF AMERICA, FEDERAL COM-
MUNICATIONS COMMISSION, AND MUTUAL BROAD-
CASTING SYSTEM, INC., APPELLEES

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

THE UNITED STATES OF AMERICA, FEDERAL COM-
MUNICATIONS COMMISSION, AND MUTUAL BROAD-
CASTING SYSTEM, INC., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE TO MOTIONS FOR TEMPORARY RESTRAINING
ORDERS

In the Supreme Court of the United States

OCTOBER TERM, 1941

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NATIONAL BROADCASTING COMPANY, INC., WOODMEN
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RESPONSE TO MOTIONS FOR TEMPORARY RESTRAINING
ORDERS

These suits were brought in a statutory three-
judge district court to enjoin the enforcement of

regulations of the Federal Communications Commission relating to radio stations engaged in chain broadcasting (NBC R. 1-18; CBS R. 1-20, 46-48). The court below held that it was without jurisdiction of the suits (NBC R. 432-445; CBS R. 456-470), but entered orders restraining enforcement of the regulations "until May 1st, 1942, or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier." (NBC R. 451; CBS R. 482).

On April 27, 1942, the Commission agreed by stipulation further to suspend enforcement of the regulations "until the last decision day of the October 1941 term of the Supreme Court of the United States or until the determination of the pending appeal * * *, whichever is earlier." The next day both of the appellants filed motions in this Court for orders restraining enforcement of the regulations "until ten days after the filing in the district court of the mandate upon this Court's decision on this appeal.

Appellants state that by these motions they seek three things which have not already been granted to them by the stipulations:

1. In the event this Court affirms the judgments below they want time within which to pursue such other remedy as may be available or to modify their affiliation contracts so as to comply with the Commission's regulations.

2. In the event the judgments are reversed they want time within which to seek from the district court a determination of their motions for preliminary injunctions.

3. In the event this Court should not dispose of these appeals during the present term they want an order which will restrain enforcement of the Commission's regulations during the summer.

1. Insofar as appellants seek a stay in the event of an affirmance we oppose their request. The court below held that it was without jurisdiction of these cases and dismissed the complaints. If this Court should affirm, there would be no basis for enjoining enforcement of the regulations during the 25 day period before the mandate issues and for ten days thereafter.

Appellants' suggestion that a stay is necessary in order to afford them an opportunity to pursue "such other remedy as may be available" we believe is unwarranted. If their choice of court was wrong, that should not provide occasion for a stay while they look for relief elsewhere. Moreover, we argue in our brief (pp. 48-53) that the chain broadcasting regulations are not reviewable at this time in *any* court because they have no immediate legal effect but are mere declarations of the policies to be applied in future administrative proceedings. If this is correct, there is no other available remedy.

Nor is there basis for the assertion that if no other remedy is available the networks need a stay from this Court in order to arrange for the modification of contracts with their affiliated stations which do not comply with the policies announced in the chain broadcasting regulations. As our brief points out (pp. 27-28), the effect of the regulations will simply be that any radio station which has a contract with a network which does not comply with the announced policies will have its next application for a renewal of its license set for hearing. If, at or before that time, the licensee and the network should advise the Commission that they desire an opportunity to modify their affiliation contract so as to conform to the Commission's policies, they would, of course, be granted a reasonable postponement of the hearing.

2. If this Court should reverse the judgments and hold that the court below does have jurisdiction, of course, we would not object to a stay which would allow appellants a reasonable period after the filing of the mandates in which to seek from the district court a determination of their motions for preliminary injunctions, and the Washington legal representatives of appellants were so advised.

3. The stipulations suspend enforcement of the regulations up until the last decision day of the present Term. If the cases are disposed of at

this Term the question of a stay extending over the summer would become moot. Accordingly, there appears to be no occasion for the Government to state its views on that question at this time. However, if it should develop that the cases cannot be decided at the present Term, we would like the opportunity to file a further memorandum or to be heard before the circuit Justice.

Respectfully,

CHARLEY FAHY,
Solicitor General.

APRIL, 1942

Nos. 1025-1026

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BRIEF FOR THE UNITED STATES AND THE FEDERAL
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**BRIEF FOR THE UNITED STATES AND THE FEDERAL
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OPINION BELOW

**The opinion of the district court (Learned Hand,
Cir. J., and Goddard, D. J.), and the dissenting**

(1)

opinion (Bright, D. J.), appear in the National Broadcasting case (NBC) record (No. 1025) at pp. 432-445, and in the Columbia Broadcasting case (CBS) record (No. 1026) at pp. 456-470.¹

JURISDICTION

The decision of the court below, dismissing the complaints, was entered on February 21, 1942. Petitions for appeal were filed on February 28, 1942, and were allowed on March 2, 1942 (NBC R. 451-453; CBS R. 471, 483). On March 16, 1942, this court noted probable jurisdiction. The jurisdiction of this court on appeal rests on the Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. §§ 47-47a, as extended by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 402 (a).

QUESTION PRESENTED

Whether certain regulations announced by the Federal Communications Commission setting forth policies to be applied by the Commission in licensing radio stations engaged in chain broadcasting, are at this time subject to judicial review in an equity proceeding.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C., §§ 151 et seq., and of the

¹ Since the court below disposed of the two cases in a single opinion and since the same issues are involved, this brief will cover both cases.

Urgent Deficiencies Act, 28 U. S. C. §§ 43-48, are set forth in the Appendix, *infra*, pp. 59-64.

STATEMENT

These suits were brought on October 30, 1941² in a statutory three-judge district court to enjoin the enforcement of certain regulations, relating to radio broadcast stations engaged in chain broadcasting, which were adopted by the Federal Communications Commission on May 2, 1941, and amended October 11, 1941. There are eight such regulations, designated by the Commission as Regulations 3.101 to 3.108, inclusive. (See Appendix, pp. 64-69, *infra*.)

Chain broadcasting is the principal means by which programs of interest are made available to all or a large part of the national radio audience.³ It is defined in the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations"⁴ and is accomplished by sending the program by telephone

²The CBS complaint was amended on January 12, 1942 (CBS R. 46-48).

³Depending upon their power, which ranges from 100 to 50,000 watts, individual radio stations render satisfactory technical service within a radius from the transmitter which varies from only a few miles to 100 or 150 miles. At night, the more powerful stations also render a less satisfactory "secondary service" within a radius of hundreds of miles from the transmitter.

⁴Section 3.(p) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 153 (p).

wire from its point of origin to each of the outlet stations of the chain or network for broadcasting over their transmitters. These outlet stations are in some instances owned and operated by the network organizations themselves, but more commonly they are independently owned and are associated with the network by means of an "affiliation contract."

At the time they brought these suits the appellants, National Broadcasting Company, Inc. (herein called NBC or National), and Columbia Broadcasting System, Inc., (herein called CBS or Columbia) operated three of the four nation-wide "chains" or "networks."⁵ Appellants, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company are the licensees respectively of Stations WOW at Omaha, Nebraska, and WHAM, at Rochester, New York, which are affiliated with NBC and thereby are engaged in chain broadcasting.

The United States and the Federal Communications Commission were joined as defendants in the suit brought by NBC. The CBS suit was brought against the United States alone, but the Federal

⁵ NBC then operated two networks known as the "Red" and the "Blue," but during the course of this proceeding the court was advised that it had disposed of the Blue network. (NBC R. 434.) NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC is a wholly owned subsidiary of the Radio Corporation of America (NBC Br. 5).

Communications Commission intervened as a defendant. Mutual Broadcasting System, Inc., which operates the fourth national network, intervened in both cases as a defendant.

The proceedings before the Commission.—The regulations sought to be attacked were adopted by the Commission as the result of an investigation instituted on March 18, 1938, "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity." (NBC R. 37-38; CBS R. 57-58.) On April 6, 1938, a committee of three Commissioners was appointed to hold hearings and to make a report with recommendations to the Commission. The committee held hearings between November 14, 1938 and May 19, 1939. The networks and other interested persons participated actively in the hearings and expressed their views at length. The testimony and exhibits fill 27 large volumes.* On June 12, 1940, the committee issued its report. (NBC R. 37-38; CBS R. 57-58.)

Thereafter, briefs were filed on behalf of the national networks and other interested parties, and oral arguments were presented before the full Com-

* The record before the Commission was filed with the court below in support of the Government's motions to dismiss the complaint or in the alternative for summary judgment, and also in opposition to appellants' motions for preliminary injunction. (NBC R. 262, 380; CBS R. 346, 153.)

mission. On May 2, 1941, the Commission issued its Report, together with an order adopting the eight regulations here attacked.⁷ The effective date of the regulations was deferred for 90 days with respect to existing contracts and licenses of network-operated stations (NBC R. 128; CBS R. 148).

The effective date of the regulations with respect to existing contracts and network station licenses was successively postponed by the Commission on June 13, July 22, and August 28, 1941.⁸ On August 14, 1941, Mutual petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Briefs were filed by the national networks and one regional network, and oral argument was had before the Commission September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on

⁷ The Commission's Report was attached to NBC's complaint as Exhibit D (NBC R. 29-200) and to the CBS amended complaint as Exhibit B (CBS R. 49-220). Two of the seven Commissioners filed additional views, which are included in the Report, dissenting from the action taken by the Commission.

⁸ On June 13, 1941, the Commission postponed the effective date of Regulation 3.107 for 90 days from May 2, 1941. On July 22, 1941, the effective date of all the rules with respect to existing contracts and network station licenses was deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed pending action on a petition filed by Mutual for amendments to two of the regulations (NBC R. 201-203; CBS R. 20-22).

Chain Broadcasting,* together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts and licenses of network-operated stations until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice.

On October 31, 1941, the Commission adopted a Minute (see appendix, pp. 69-70) with reference to the procedure which it proposed to follow in applying the policies announced in the chain broadcasting regulations. The Minute sets forth that if any licensee wishes to contest the validity of the regulations or the reasonableness of their application to the particular licensee, the license will be designated for hearing. It further sets forth that such licensee will be granted a temporary extension of its license so that it may remain on the air pending the proceeding before the Commission and pending appeal to the courts from a decision in any such proceeding; and, further, that in the event that the validity of the

*The Supplemental Report is attached to the NBC complaint as Exhibit E (NBC R. 201-217) and to the CBS complaint as Exhibit C (CBS R. 20-36). Two of the six Commissioners (there being at that time one vacancy on the Commission) dissented from the Supplemental Report in an opinion included therein.

regulations as applied to the licensee should be upheld, the Commission would nevertheless grant a regular license to the licensee if he thereupon conformed to the decision in the litigation. (NBC R. 440-441; CBS R. 465-466.)

Factual Background.—The chain broadcasting regulations here attacked are applicable to radio broadcasting stations operated in the “standard broadcast band.” This band—550 to 1600 kilocycles¹⁰—is a small portion of the entire radio spectrum, the balance of which is allocated for other radio uses.¹¹

Within the standard band there are approximately 106 “channels” available for broadcasting stations.¹² These 106 channels are occupied by

¹⁰ Federal Communications Commission, Rules and Regulations, Part 2, Appendix B, Frequency Allocations. A copy of the Commission's Rules and Regulations has been filed with the Clerk.

¹¹ The various uses in the remainder of the spectrum include other forms of broadcasting and radio communication, such as television and frequency modulation, amateur, police, marine, aeronautical, and military radio, and many other services. Federal Communications Commission, Rules and Regulations, Part 4, Rules Governing Broadcast Services Other Than Standard Broadcast; Part 5, Rules and Regulations Governing Experimental Radio Services; Part 6, Rules Governing Fixed Public Radio Services; Part 7, Rules Governing Coastal and Marine Relay Services; Part 8, Rules Governing Ship Service; Part 9, Rules and Regulations Governing Aviation Services; Part 10, Rules Governing Emergency Radio Services; and Part 12, Rules Governing Amateur Radio: Stations and Operators.

¹² In order that there be opportunity for effective selection by listeners among radio stations, the Commission's rules

some 900 licensed broadcast stations. The number of stations which can be placed on a single channel without causing wasteful interference is determined by the power and location of the stations, and the design of their transmitting antennas.

In order that the limited spectrum available for standard broadcasting be utilized most efficiently and in the best interests of the listening public, the various channels are not all put to the same kind of use. Soon after the passage of the Radio Act of 1927, 44 Stat. 1162, the Federal Radio Commission (the predecessor of the Federal Communications Commission in the radio field) developed a plan of allocation of stations among the various channels. The allocation plan in its present form is embodied in regulations promulgated by the Federal Communications Commission.¹³ These allocation regulations are declarations of policy which guide the Commission in exercising its licensing functions. Thus, for example, on six channels the Commission licenses only "local" stations operating with power of 100 or 250 watts; many such stations can be assigned to a single channel, as each station renders service only a few miles from the transmitter. About 40 channels are assigned for

(*infra*, note 13) require a separation of 10 kilocycles between each channel.

¹³ Federal Communications Commission, Rules and Regulations, Allocations of Facilities, Sections 3.21-3.34, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Section 1.

the medium-sized "regional" stations, which utilize from 500 watts to 5 kilowatts of power, and about 45 channels for the powerful "clear channel" stations, which may use from 10 to 50 kilowatts."

The limited portion of the radio spectrum available for broadcasting restricts not only the total number of broadcast stations, but, if fair distribution is to be made, the number which can be established in particular communities. New York City, Chicago, and Los Angeles have a dozen or more stations each, and most of the other very large cities have from 5 to 8 stations. Some 35 cities have 4 or more full-time¹⁴ stations, and some 60 have 3 or more (NBC R. 87, 104; CBS R. 107, 124).

¹⁴ Depending on power, location, and antenna design, from one to four clear channel stations can usually be placed on a single channel. These large stations are very important in furnishing service to the rural areas. Both day and night, they furnish a reliable and consistent "primary" service which may extend as far as 150 miles from the transmitter. At night, such stations also furnish a "secondary" or "skywave" service, which results from the reflection of radio waves from the so-called Kennelly-Heaviside layer, many miles above the surface of the earth. This "secondary" service extends for hundreds of miles from the transmitter, and is the only radio service which large areas of the country receive, but it is weaker, and more fluctuating and uncertain, than "primary" radio service, and in general is usable only between sunset and sunrise. See Section 3.11, Federal Communications Commission, Rules and Regulations, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Section 1.

¹⁵ Some stations are authorized to operate only in the daytime or only during certain specified hours.

All these stations, depending on their power and the nature of the surrounding territory, serve a variety of functions and purposes. The programs which they provide may be local, regional, or national in character. Except for a few non-commercial stations, however, all of them are supported by selling time for the use of their broadcasting facilities for advertising purposes, and these revenue-producing programs are called "commercial" or "sponsored" programs, as distinguished from "sustaining" programs, which are provided by the station itself without commercial sponsorship (NBC R. 41, 75-76; CBS R. 61, 95-96).

Because no single station or small group of stations is able to provide truly national coverage, and because many programs of national interest cannot be produced by single stations with limited resources and perhaps remote from talent centers and the scene of national events, the need for chain broadcasting became manifest soon after broadcasting first began.¹⁶ The oldest existing national broadcasting organization—the National Broadcasting Company—was formed in 1926, and the Columbia Broadcasting System dates from January, 1927. The newest national network, Mutual, was founded in September 1934. (NBC R. 44, 57, 62; CBS R. 64, 77, 82).

Networks as such are not licensed or subject to regulation under the Communications Act.

¹⁶ Broadcasting began in 1920, and the first network broadcast occurred in January, 1923 (NBC R. 41; CBS R. 61).

Their business consists basically of entering into contracts with national advertisers, usually through advertising agencies, making arrangements for the distribution of commercial programs, sponsored by these advertisers, over leased wire lines for broadcasting by the stations comprising the network, and producing or arranging for the production of sustaining programs (which are not commercially sponsored). NBC and CBS each are licensed to operate several important high-powered stations located in the principal radio markets,¹⁷ but for the most part the networks obtain broadcasting outlets for their programs by contracts with independently owned stations. These independently owned stations which carry network programs are generally referred to as "affiliates," and the contract as an "affiliation contract."

NBC and CBS furnish both commercial and sustaining programs to their affiliates. Sustaining programs may be accepted or rejected at will by the affiliates, and are made available to them at no separate charge. NBC and CBS have basically similar arrangements for compensation to their affiliates for network commercial programs.

¹⁷ CBS is the licensee of 8 stations; at the time this litigation was instituted NBC was the licensee of 10 stations, but at the present time 6 of these stations are still licensed to NBC, 3 have been transferred to the new "Blue" network, and one has been transferred to other interests (NBC R. 51-52; CBS R. 79).

Stated in simplified terms, their affiliation contracts establish a rate for each station which is charged to the advertiser for the use of that station's time;¹⁸ a portion of the receipts from the advertiser is turned over to the station, and a portion retained by the network. Accounting between the network and the station is on a 28-day basis. The station usually receives no compensation for carrying a fixed minimum amount of commercial programs during that period, but if commercials over and above the minimum are furnished, the station receives a portion of the rate, which increases as more commercials are taken. The time of the station which is furnished free to the network for commercial programs, and the portion of the station rate retained by the network for the other hours, cover the network's sustaining program costs, wire line and other expenses, and profits.¹⁹

Because of the limited area covered by any single station, it is important that a network have an outlet in each radio advertising market which it purports to cover.²⁰ This necessity, as is described

¹⁸ For the most part, these rates range from \$120 to \$1,200 per evening hour, depending upon the power and location of the station (NBC R. 77, 78; CBS R. 97, 98).

¹⁹ NBC R. 76-79; CBS R. 96-99.

²⁰ Because the electrical "noise level" is much higher in cities than in rural areas, a stronger signal is necessary to provide service in cities than in the country. See Sections 1, and 4, Standards of Good Engineering Practice Concerning Standard Broadcast Stations. This technical factor accentuates the need of a network to have an outlet situated in or near each large city which it purports to cover.

immediately hereafter, was found by the Commission to raise acute problems in those cities having four or less stations.

The Chain Broadcasting Regulations.—The legality and wisdom of the regulations attacked in these suits are not in issue in these appeals, but the reasons which led to their adoption are closely related to the manner in which they are to be applied by the Commission, and are therefore relevant to the jurisdictional question here presented. The purposes which underlie the regulations are set forth in the Commission's Report and Supplemental Report, attached to the complaint in both suits.

The principal function of the Commission in the broadcasting field is to act upon applications for and by broadcast stations. The statutory standard for the exercise of this function is "public interest, convenience, or necessity," which is given significance "by its context, by the nature of radio transmission and reception, by the scope, character and quality of services," and by the general objectives of the statute.²¹ The Commission is also given specific authority by Section 303 (i) of the Communications Act to adopt "special regulations applicable to radio stations engaged in chain broadcasting." The impact of these provisions upon existing network practices was the principal sub-

²¹ *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 285.

ject of the Commission's investigation and reports, and whether the statutory standard comprehends the regulations which resulted from the investigation is the principal question sought to be tested by these suits.

The Report and Supplemental Report show that the Commission, in applying the public interest standard to existing network practices, followed certain basic lines of thought: that the individual station licensee is responsible under the law for the operation of his station in the public interest and that this responsibility may not be divested or transferred to anyone else;²² that the widest and most effective use of radio should be promoted;²³ that competition in the broadcast field should be preserved;²⁴ and that such a degree of concentration of control of broadcasting as would tend to restrict the channels of communication and expression or the sources of programs should be prevented.²⁵ In applying these principles, the Commission acted in the belief that broadcast stations should be reasonably available for programs of local and regional, as well as national interest,²⁶ that communities should, as far as practicable, have available service from more than one or all national

²² NBC R. 88, 97, 101, 102, 117; CBS R. 108, 117, 121, 122, 137.

²³ NBC R. 93, 98, 116-117; CBS R. 113, 118, 136-137.

²⁴ NBC R. 82-86, 88, 97, 103, 108, 111, 118-119; CBS R. 102-106, 108, 117, 123, 128, 131, 138-139.

²⁵ NBC R. 92, 108, 109; CBS R. 112, 128-129.

²⁶ NBC R. 101; CBS R. 121.

networks,²⁷ and that methods of nation-wide broadcasting other than by means of networks (such as by transcriptions), should not be unreasonably restricted.²⁸

From these points of departure, the Commission declared in Regulation 3.101 a policy against clauses embodied in Columbia's affiliation contracts (but not in National's²⁹) which prevent the affiliate from carrying the programs of competing networks. The Commission found that, in cities where there are fewer than four stations, such clauses operate to exclude the programs of one or more of the existing national networks, and that in cities with only four stations a new network would be excluded. The Commission further found that such clauses restrict the station's freedom to select among available network programs, and tend to deprive the listening public in each community of the fullest enjoyment of its radio facilities (NBC R. 87-93; CBS R. 107-113).

Correlatively, the Commission declared in Regulation 3.102 a policy against clauses embodied in Columbia's affiliation contracts (but not in National's³⁰) which prohibit the network from furnishing programs to any other station in the service area of the affiliate. So far as these clauses prevent

²⁷ NBC R. 88; CBS R. 108.

²⁸ NBC R. 100; CBS R. 120.

²⁹ This is shown by National's complaint. NBC R. 12, 18-25.

³⁰ See footnote 29, *supra*.

duplication of programs in the same area, the Commission found them unobjectionable. But the Commission found that these clauses had the further effect that, even where the affiliate rejects the program offered by the network, other stations in the community are prevented from utilizing the program. The Commission found that these clauses, insofar as they prevent communities from receiving network programs which a community station is ready and willing to carry, are not in the public interest (NBC R. 93-95; CBS R. 113-115).

Both National's and Columbia's affiliation contracts contain a provision which gives the network an option, exercisable on 28 days' notice, on the time of the station for network commercial programs. The Columbia option time clause covers all the clock hours in the broadcast day;³¹ the National clauses, in general, cover 8½ specified hours each day.³² The Commission found that the result

³¹ The one limitation upon the power of Columbia to call upon its affiliates to broadcast network commercial programs is that an outlet is not obligated to broadcast more than 50 converted hours (approximately 79 clock hours) during any week. Since the above limitation is on an over-all basis, no specified clock hours are excluded from the option. (CBS R. 93).

³² The NBC options, in general, cover the hours from 10 a. m. to 12 noon, 3 p. m. to 6 p. m., 7 p. m. to 7:30 p. m., and 8 p. m. to 11 p. m. The Sunday optioned hours are somewhat different. In the case of NBC affiliates west of Denver, the NBC option covers the entire broadcast day (NBC R. 73).

of these clauses is that no NBC or CBS affiliate can give a competing network or a non-network customer a firm commitment for the use of the affiliate's time (within the hours covered by the option) for more than 28 days in advance. Consequently, the Commission concluded that these option time provisions have approximately the same effect with respect to network programs as do the exclusive affiliation clauses, since the option clauses make it impossible for the affiliate to accept any programs from a competing network (within the hours covered by the option) except subject to removal or cancelation should the option be exercised. The Commission also found that option time provisions have further restrictive effects which the exclusive affiliation clauses do not have, inasmuch as the option time provisions can be utilized not only to remove or cancel the programs of another network, but also to remove *any* program, including local and national non-network programs (NBC R. 98-101; CBS R. 118-121).

For these reasons, the Commission declared, in Regulation 3.104 as amended, a policy intended to limit the scope and effect of option time clauses. The policy requires the reservation of a specified amount of time which cannot be optioned to networks at all and during which non-network programs can accordingly be scheduled on a firm basis; it requires that the option be exercised only on 56- rather than 28-days' notice; and it further provides

that the option can be utilized only as against non-network programs, and cannot be used to remove or cancel the programs of another network.³³

Regulation 3.106 deals, not with affiliation contracts, but with the direct operation of broadcast stations by network organizations. Both NBC and CBS are now licensed to operate several important and powerful stations located in principal radio markets. The Commission found that, in communities where the available radio facilities are few in number or of markedly unequal coverage, network operation of stations, like exclusive affiliation clauses, might shut out other networks from the community.³⁴ Accordingly, the Commission in this rule declared a policy against the licensing of stations to network organizations "in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

The foregoing discussion is intended to be illustrative of the purpose underlying the regulations, rather than a complete statement of their scope and

³³ It should be noted that the policy declared in Regulation 3.104 does not restrict the outright purchase of station time by a network for a program or series of programs (NBC R. 207; CBS R. 26).

³⁴ NBC R. 102-105; CBS R. 122-125.

effect.³⁵ The Commission concluded that the regulations would foster and strengthen network broadcasting and benefit the listening public, and that they would preserve without loss the contributions of network broadcasting without interfering unduly with the operations of the network organizations (NBC R. 124, 212; CBS R. 31, 144).

The proceedings in the court below.—The complaint of NBC, Woodmen, and Stromberg (No. 1025) requests the court to enjoin the enforcement of all eight of the Commission's chain broadcasting regulations. The CBS complaint seeks an injunction against Regulations 3.101–3.106 only. Both

³⁵ The remaining regulations, and other phases of the regulations which have been dealt with, are of less importance or are not as seriously contested.

Regulation 3.103 declares a policy against affiliation contracts of more than two years' duration.

Regulation 3.105 declares a policy regarding the basis upon which affiliates may reject programs offered them by networks.

Regulation 3.106, in addition to the feature described above, declares a policy against licensing more than one station to a network organization in any community. In view of the statement made concerning this phase of Regulation 3.106 in the Commission's Minute of October 31, 1941 (Appendix, pp. 69–70, *infra*), it is of little immediate importance.

Regulation 3.107 declares a policy against the affiliation of broadcast stations with a network organization operating more than one network. The effective date of this regulation was indefinitely suspended by the Commission's Supplemental Report of October 11, 1941.

Regulation 3.108 deals with a clause formerly, but not presently, embodied in National's affiliation contracts.

complaints allege in substance that the Federal Communications Commission has no power under the statute to issue the regulations in question, and that they are arbitrary, unreasonable, unconstitutional, and without basis in the evidence (NBC R. 14-16; CBS R. 11-12, 48).

On November 8, 1941, the Government filed motions to dismiss the complaint or, in the alternative, for summary judgment. In substance these motions allege that the complaints should be dismissed because the court is without jurisdiction of the subject matter of the actions, because the complaints fail to state a claim upon which relief can be granted, and because there is no genuine issue of fact and the defendants are entitled to judgment as a matter of law (NBC R. 375-376; CBS R. 449).

Upon the filing of these motions a stipulation was entered into for the suspension of the regulations pending a hearing on all the motions and a determination by the court of appellants' motions for a preliminary injunction (NBC R. 430; CBS R. 454-455).

The case was heard by a three-judge court convened pursuant to the provisions of the Urgent Deficiencies Act, and on February 21, 1942, the Court, with one judge dissenting, granted the Government's motions to dismiss the complaints for lack of jurisdiction over the subject matter of the actions.³⁶

³⁶ Since these cases are before this Court on the basis of plaintiffs' complaints and defendants' motion to dismiss,

On February 27, 1942, appellants filed with the court below motions for ☒ pending determination of their appeals. The court below, on March 2, 1942, entered an order restraining the enforcement of the chain broadcasting regulations until May 1, 1942, or the argument of the appeals in this Court, whichever is earlier (NBC R. 451, CBS R. 482).

SUMMARY OF ARGUMENT

The chain broadcasting regulations provide that "no license shall be granted" to broadcasting stations having network contracts which contain certain provisions. The regulations themselves, however, neither grant nor deny broadcasting licenses. The procedure governing the issuance of licenses is prescribed in Sections 308 and 309 of the Communications Act. Under these provisions the Commission can *grant* a license without a hearing but cannot *deny* one without a hearing. Under the Commission's rules and regulations interested persons are permitted to intervene in these hearings.

The Commission has particularized the procedure with respect to hearings involving questions under the chain broadcasting regulations by its

plaintiffs' affidavits in support of their motions for an interlocutory injunction are not pertinent. The cases cited by Columbia (Br. 13-14) are not to the contrary. They establish, rather, the proposition that where a motion to dismiss or for summary judgment is based on facts not presented or adequately disclosed by the pleading to which it is filed, such facts may be presented by affidavits in support of the motion.

Minute of October 31, 1941. That Minute provides that any licensee may contest the validity of the chain broadcasting regulations or the reasonableness of their application to him without fear of loss of license. In the event a license is denied, the applicant and any other person whose interests are adversely affected may have judicial relief as a matter of right under Section 402 (b) of the Communications Act.

Thus, the chain broadcasting regulations simply announce the policies which the Commission intends to follow in exercising its licensing functions. Since the regulations are not final and the administrative process has not been completed, the regulations are not reviewable at this time. Resort to the courts to review administrative action of this type "is either premature or wholly beyond their province". *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 130; *United States v. Los Angeles R. R. Co.*, 273 U. S. 299; *Myers v. Bethlehem Corp.*, 303 U. S. 41.

Review of the regulations under Section 402 (b) of the Act is particularly appropriate for administrative action of the type involved here. The Commission did not undertake to frame regulations carrying penal consequences and which would have required immediate revision of affiliation contracts under the threat of criminal penalties. Instead, it framed regulations which would serve as a guide to applicants and other in-

terested parties, stating the policies which it proposed to implement and develop in the course of its licensing functions. While there is a strong likelihood that these regulations will be followed in proceedings on individual applications, the Commission's Report, Supplemental Report, and Minute clearly indicate that the further administrative proceedings are substantial and not a mere formality. Since the rules can be applied only on a case-to-case basis, it is not only appropriate but highly desirable that court review be on the same basis.

ARGUMENT

THESE SUITS ARE PREMATURE BECAUSE THE REGULATIONS HAVE NO IMMEDIATE LEGAL EFFECT BUT ARE MERE DECLARATIONS OF POLICY TO BE APPLIED IN FUTURE ADMINISTRATIVE PROCEEDINGS

1. *The manner in which the regulations are to be given effect.*—As the statement of facts discloses (pp. 16-20, *supra*) the regulations provide that "no license shall be granted" to broadcasting stations having network contracts which contain certain provisions. The regulations themselves, however, neither grant nor deny broadcasting licenses.

The procedure governing the issuance of licenses is prescribed in Sections 308 and 309 of the Communications Act. Section 308 (a) provides:

The Commission may grant licenses, renewal of licenses and modification of license, only upon written application therefor received by it * * *

Section 309 (a) provides:

If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Thus, while the Commission is empowered by the Act to *grant* a license without a hearing, it cannot *deny* an application without hearing. At such hearing any interested person may intervene by complying with the Commission's intervention rule.³⁷

The Commission has particularized the procedure with respect to hearings involving questions under the chain broadcasting regulations by its

³⁷ Regulation 1.102, provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122."

Minute of October 31, 1941. That minute (quoted in full in Appendix, pp. 69-70) provides in part:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

" This minute confirms assurances given by Chairman Fly in his testimony before the Senate Committee on Interstate Commerce several months prior to the institution of these suits. Hearings on S. Res. 113, 77th Cong., 1st sess., pp. 59, 71.

There is no merit to the suggestion in the dissenting opinion (NBC R. 444; CBS R. 469) that the Minute cannot be considered because it was not entered until after these suits were filed. The Minute constitutes a statement by the Commission of the procedure it will follow in applying the Chain Broadcasting Regulations. The fact that it was issued after

Under Section 402 of the Communications Act, judicial review of Commission action, depending upon its type, may be had in the Court of Appeals for the District of Columbia or in a statutory three-judge court. If the action involved is the grant or denial of an application for a construction permit, radio station license, or renewal or modification of a radio station license, the method of review is by appeal to the Court of Appeals under Section 402 (b) (1) and (2). Such an appeal may be taken either by the applicant or by any other person aggrieved or whose interests are adversely affected by the Commission's action. Any other type of Commission action which is susceptible of judicial review, with one minor exception," is by Section 402 (a) made reviewable in a statutory three-judge district court.

In the light of the foregoing, the procedural significance of the chain broadcasting regulations is simply that any licensee who has an affiliation contract which does not conform to the policy announced in the regulations will have his next renewal application designated for hearing. All interested persons will have an opportunity to in-

rather than before the institution of the instant suits does not detract from its relevancy and makes it no less binding on the Commission. *American T. & T. Co. v. United States*, 299 U. S. 232, 240-241; *United States v. Illinois Central R. Co.*, 291 U. S. 457, 461-462.

"The minor exception is that radio operators whose licenses have been suspended by the Commission are to seek review in the Court of Appeals for the District of Columbia.

intervene in the hearing under Regulation 1.102, *supra*, p. 25, n. 37. If at the hearing, the applicant or the interveners satisfy the Commission that the applicant's license should be renewed despite the inclusion in his affiliation contract of clauses which do not conform to the regulations, the Commission will modify or waive the regulations and grant the renewal." If, because of the terms of the affiliation contract, the applicant or interveners fail to satisfy the Commission that the grant of a renewal would be in the public interest the application will be denied. In the latter event, the applicant and any other person whose interests are adversely affected may have judicial review as a matter of right under Section 402 (b).

Thus, as the Commission pointed out in its Report on Chain Broadcasting, the regulations simply

"CBS seems to assume that the applicant is limited to contesting "validity" of the regulations in the hearing upon his application (CBS Br. p. 20). However, the Minute expressly states that the reasonableness of applying the regulations in a particular case is also at issue in the hearings, *Supra*, p. 26. The concluding paragraph of the Commission's supplemental report states (NBC R. 212; CBS R. 31-32) :

"The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation."

announce the policies which it intends to follow in exercising its licensing functions (NBC R. 121; CBS R. 141):

Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based.⁴¹

⁴¹ See *Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong., 1st sess. pp. 26-27.

The Commission employs other methods to announce the policies it will follow in its licensing activities. In addition to regulations, the Commission announces policy in press releases and written opinions. For example, the Commission's policy with respect to licensing new standard broadcasting stations during the present war emergency was made public in a memorandum opinion dated February 23, 1942. 7 Fed. Reg. 1702 (1942). This opinion stated that because of a shortage of the critical material required for the construction of radio stations the Commission would not issue any

2. *Since the regulations are not final and the administrative process has not been completed, the regulations are not reviewable at this time.*—The rule that “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted” is “one of judicial administration,” “and not merely a rule governing the exercise of discretion” *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51, and cases cited. It applies to “proceedings at law as well as suits in equity” *ibid.* It is thus applicable to cases under the Urgent Deficiencies Act just as to all other suits for injunctive relief.

In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, which involved an order of the Federal Communications Commission and arose under the Urgent Deficiencies Act, the Court pointed out that the rule was derived in part from Article III of the Constitution with its limitation of judicial power to the determination of cases and controversies, and in part from “the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding” (307 U. S., at 131). The *Rochester* opinion describes a classification in which judicial

new authorizations involving the use of critical materials unless the applicant could show that the new station would provide primary service to an area no substantial part of which already receives such service. See also p. 35, *infra*.

review is not permissible in terms which plainly encompass the case at bar (307 U. S., at 130):

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.

The *Rochester* opinion then refers to and quotes from *United States v. Los Angeles R. R.*, 273 U. S. 299, as follows (307 U. S. at 130-131):

The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act * * *: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310.

Since the regulations in the present case do not contain a command, deny a license, change a status, or determine any right, or liability, the above

language is plainly applicable.⁴² Not until the administrative process is completed by denial of an application for a license will the time have arrived for judicial intervention. See also *Delaware & Hudson Co. v. United States*, 266 U. S. 438.

Other decisions likewise hold that administrative rulings of an intermediate character which do not have final legal effect are not subject to judicial review. Thus, the designation of a matter for hearing is not the type of administrative action which courts will review. *United States v. Illinois Central R. R.*, 244 U. S. 82; *Federal Power Comm'n. v. Edison Co.*, 304 U. S. 375. This result follows *a fortiori* in the instant cases, where applications have not even yet been designated for hearing but the Commission has merely adopted regulations under which certain applications would thereafter be designated for hearing.

⁴² The carrier in the *Los Angeles* case argued that jurisdiction could be entertained both under the Urgent Deficiencies Act and "under the general equity power of the court" (273 U. S. at 314). This Court rejected both arguments; in answering the latter it declared (273 U. S. at 314-315):

"No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. * * *

And where the administrative action in question consists as it does here of a mere announcement as to policy, it is particularly true that the courts will not intervene prior to the completion of the administrative process. Cf. *Ashwander v. Valley Authority*, 297 U. S. 288, 324; *John P. Agnew Co. v. Hoage*, 99 F. (2d) 349 (App. D. C.); *Standard Oil Co. v. Board of Purification of Waters*, 43 R. I. 336, 111 Atl. 887.

Appellants, however, argue that the chain broadcasting regulations have present legal effect. Both NBC (Br. 35) and CBS (Br. 44) suggest that a violation of the regulations would be the basis for a revocation proceeding pursuant to Section 312 (a) of the Communications Act, since that section provides that a license may be revoked "for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act." But operation of a station under an affiliation contract which does not conform to the rules would not provide a basis for revocation under the clause quoted, since the regulations do not prescribe rules of conduct with which licensees must comply. Obviously this is the case, because only the Commission can violate a regulation which provides that "no license shall be granted." Therefore, proof of operation under an affiliation contract which did not conform to the rules, without more, would

not furnish a basis for revocation.⁴³ For the same reason it would not expose the licensee to the criminal penalties provided in Section 502 of the Act for violation of Commission rules.

Appellants also assert (NBC Br. 23-25, 36; CBS Br. 44-45) that the Commission phrased its regulations as it did in an attempt to confine judicial review to appeals from orders entered in licensing proceedings. There is no basis for this assertion. If the Commission had not phrased its regulations in terms of "no license shall be granted," licensees with network affiliation contracts would have been forced immediately to alter their contracts or be subjected to criminal penalties. Moreover, regulations of the sort involved in this case are a cus-

⁴³ Operation of a station under an affiliation contract which does not conform to the rules might, however, constitute a basis for revocation under another portion of Section 312 (a) which authorizes the Commission to revoke a license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application." Under this clause, however, the Commission could not revoke merely because a regulation was not being complied with. On the contrary, the test would be exactly the same as in renewal proceedings, and the licensee could successfully contest the revocation if he could show that the regulations were unreasonable as applied to him, or that for any other reason his continued operation would be in the public interest despite the inclusion in his affiliation contract of clauses which did not conform to the chain broadcasting regulations. In any event, as indicated in the Commission's Minute of October 31, 1941, the renewal procedure will be followed (NBC R. 437; CBS R. 461).

tomary way by which the Commission announces policy rules as a guide to its licensing functions. For example, the regulations announcing the Commission's policy with respect to the showing it will require before it will issue a license for a new standard, international, high frequency or television broadcast station are similarly phrased." On the other hand, regulations such as those which require licensees to maintain their assigned frequency, power, and hours of operation; which direct them to keep program and operating logs; and which specify the manner in which a station must identify itself by announcing its call letters at regular intervals are phrased in the form of direct commands or prohibitions."

"Regulations 3.24, 4.42, 4.112, and 4.223.

For other examples of regulations announcing licensing policies see regulations 2.77 (use of apparatus employing damped wave emissions); 4.32 (restrictions on licensing of "studio-transmitter" stations); 4.132 (a) (showing required for licensing of noncommercial educational broadcast stations); 4.152 (showing required for licensing of developmental broadcast station); 5.12, 5.52, 5.72, and 5.92 (showing required for licensing of Class 1, Class 2, or Class 3 experimental stations), and 12.62 (restrictions on licensing of amateur station licenses).

"Regulations 3.251, 3.252, 3.261, 3.404, 3.406. For other examples of similar regulations see 3.43 (prohibition against changing number of vacuum tubes to tubes of different power rating or class of operation or to change system of modulation); 3.45 (c) (prohibition against changing height of transmitter or making substantial changes in radiating system); 3.408 (d) (prohibition against rebroadcast of programs without first obtaining permission), and 12.63 (pro-

It is further argued that the fact that a comprehensive investigation was made before the regulations were issued (NBC Br. 25-26) and the fact that their effective date has been postponed from time to time (NBC Br. 33-34; CBS Br. 43) show that the regulations were intended to be and are regarded by the Commission as something more than mere declarations of policy. However, the wide scope and thoroughness of the Commission's investigation simply show the Commission's desire to be fully informed before formulating a policy. The orders of postponement are likewise without significance because their sole effect has been to defer the date when the Commission will begin to insist that these issues be dealt with in applications for renewal."

hibition against location of amateur radio station on premises controlled by an alien). Rules 3.230 and 4.226, relating to multiple ownership of frequency modulation and television broadcast stations, respectively, are also phrased as mandatory directions to licensees, but have the same legal effect as the rules cited in Note 44, *supra*, since they can relate only to the issuance of licenses.

"NBC also argues (Br. 28-29) that the precise draftsmanship of the regulations and the Commission's reliance on Section 303 (i) of the Communications Act show that the regulations are intended to be final in nature. These arguments seem utterly insubstantial. The regulations were phrased precisely, where it was possible to do so, in order that the policy should be clearly expressed. But obviously the application of these policies is subject to the general standard of "public interest, convenience, or necessity," in the Communications Act, and the Commission's procedure is

Appellants cite *American T. and T. Co. v. United States*, 299 U. S. 232; *Kansas City So. Ry. v. United States*, 231 U. S. 432, and *Interstate Commerce Com. v. Goodrich Transit Co.*, 224 U. S. 194, in support of their contention that the regulations are reviewable at this time (NBC brief, pp. 15, 23; CBS brief, pp. 47-48). These cases are not in point. They involved suits under the Urgent Deficiencies Act and comparable provisions of the Commerce Court Act challenging the validity of accounting regulations issued by the Federal Communications Commission and the Interstate Commerce Commission respectively. In each case the applicable statute imposed penal sanctions for failure or refusal to keep accounts in the manner prescribed. The administrative action had been completed, and the regulations had immediate legal effect. The carriers were faced with the alternative of complying with the regulations or of incurring criminal penalties. No reason, therefore, existed for refusal to take jurisdiction.

The other cases relied on by appellants (NBC Br. 15, 23, 37; CBS Br. 24, 45, 47-48) in which jurisdiction was entertained by a three-judge court similarly involved administrative orders having

designed so that there will be full opportunity for the licensee to defend his application under the statutory standard. Section 303.(i) has been relied upon by the Commission as supporting its power to issue these regulations, but, of course, this does not show that the regulations are intended to be anything more than declarations of policy.

immediate legal effect. Thus, in most of these cases, as in the accounting regulations cases discussed above, the order reviewed automatically made effective the sanctions imposed by the act for conduct in violation of its terms. See *Assigned Car Cases*, 274 U. S. 564; *Chicago, R. I. & P. Ry. Co. v. United States*, 284 U. S. 80; *United States v. B. & O. R. Co.*, 293 U. S. 454; *Powell v. United States*, 300 U. S. 276; Interstate Commerce Act, 49 U. S. C. secs. 5 (8), 16 (a) and 20 (7). In the *Chicago Junction Case*, 264 U. S. 258, the order of the Commission made conduct lawful which, but for the order, would have been unlawful.

In relying on the above cases, appellants seem to imply that the Government's position is that the regulations are not reviewable because they are legislative in character. In fact, no such contention is made; the Government's position is that the regulations here attacked are not reviewable because, unlike those involved in the cases just discussed, they contemplated additional administrative action, they have no immediate legal effect, and they carry no sanctions and are not susceptible of violation.

In addition, Columbia relies (Br. 41, 42) on two cases not arising under the Urgent Deficiencies Act—*Waite v. Macy*, 246 U. S. 606, and *Euclid v. Ambler Co.*, 272 U. S. 365. Both are inapplicable. The statute involved in *Waite v. Macy* made no provision for ultimate judicial review of either the

Secretary's regulations or the Tea Board's determinations. Cf. *Buttfield v. Stranahan*, 192 U. S. 470, 497. Since the regulations of the Secretary of the Treasury were binding upon the Tea Board, which had no discretion in their enforcement, it was held there was no reason to await the determination of the Tea Board.

In the *Euclid* case the zoning ordinance in question established the zones, and the permissible uses of the property in each zone, and prescribed penalties for violations. The Board of Zoning Inspectors was entrusted with only a limited discretion to alter details in specific cases of practical difficulty or unnecessary hardship, and could not depart from the general zoning scheme set up by the ordinance.⁴⁷

3. *The appellants have an adequate remedy.*—As the court below held (NBC R. 437-438, CBS R. 461-462), the Communications Act provides administrative and judicial procedure whereby the validity and applicability of the chain broadcast-

⁴⁷ Other cases cited by Columbia for the proposition that review at this time is not premature (CBS Br. 40-41) are likewise inapplicable. In *Pierce v. Society of Sisters*, 268 U. S. 510, and *Terrace v. Thompson*, 263 U. S. 197, the statutes involved were penal, imposing criminal sanctions for engaging in the conduct prohibited. No administrative remedies were made available to any of the persons affected, and there was no doubt as to the impact of the criminal provisions if the acts were permitted to go into effect on the appointed date.

ing regulation can be tested in an orderly manner. Appellants have failed to follow this necessary procedure. *Myers v. Bethlehem Corp.*, 303 U. S. 41; *Federal Power Comm'n v. Edison Co.*, 304 U. S. 375; *Black River Valley Broadcasts v. McNinch*, 101 F. (2d) 235 (App. D. C.), certiorari denied 307 U. S. 623; *Sykes v. Jenny Wren Co.*, 78 F. (2d) 729 (App. D. C.), certiorari denied 296 U. S. 624.

As we have pointed out, all of the issues which appellants seek to litigate here may be raised by them—whether licensee^s or networks—in the future administrative proceedings in which the chain broadcasting regulations can alone be applied. The regulations relating to affiliation contracts can be applied against Woodmen, Stromberg, or other licensees only after their licenses have been set for hearing and hearings have been held. In any such hearings the networks will have an opportunity to intervene under the Commission's intervention rule, *supra*, p. 25, n. 37. Likewise, Regulation 3.106, relating to the operation of stations by networks, can be applied against the networks only in a proceeding involving a hearing on the license of the network-operated station involved. In such a proceeding the network organization itself will be a party as the licensee.⁴⁸

⁴⁸ In fact NBC appears to concede (Br. 27) that so far as Regulation 3.106 is concerned the court below was without

Appellants attempt to avoid the effect of the familiar rule as to the necessity for completing the administrative process before the courts will assume to review administrative action on the ground that the administrative remedy which remains is inadequate. They contend that unless *all* stations choose to contest the regulations in license proceedings before the Commission, the networks will suffer immediate injury.

The networks state (NBC Br. 43, 45; CBS Br. 31) that some of their affiliates have sought or will seek to amend their contracts so as to conform to policies declared in the regulations, and that they will be injured unless all network affiliates contest the regulations.⁴⁰ However, as has been stated, licensees are not threatened with the imposition of any sanction if they wish to contest the regulations. Even if a station should notify the Commission that it has unilaterally modified its network contract, it would not follow, as appellants suggest (NBC Br. 44; CBS Br. 28-30) that the Commission would automatically grant a license renewal without holding a hearing. There is no reason to suppose that the Commission would accept the unilateral statement

jurisdiction of its suit. And by the same token the court had no jurisdiction of the suits brought by NBC's co-plaintiffs, Woodmen of the World and Stromberg-Carlson.

⁴⁰ This argument, obviously, is not available to plaintiffs Woodmen and Stromberg, who are themselves licensees, nor is it relevant with respect to Regulation 3.106, which affects the networks only in their capacity as licensees.

of one of the parties that the contract had been modified. The Commission might well set the renewal application for hearing in order to determine whether the station was actually in a position to operate in accordance with the chain broadcasting regulations.

In any event, if affiliated stations insist upon altering their present contractual relationships, that is an act of their own choice and not a result in any way commanded or compelled by the regulations. Any injury thereby inflicted by the affiliated station on the network would not flow from any legal force or effect of the regulations, but would be incidental consequences which would not render the regulations here justiciable. Interim administrative action frequently has incidental consequences which do not constitute legal injury. *United States v. Los Angeles & S. L. R. R.*, 273 U. S. 299; *Brooklyn Eastern District Terminal v. United States*, 27 F. (2d) 634, 636 (S. D. N. Y.); *Securities and Exchange Commission v. Electric Bond & Share Co.*, 18 F. Supp. 131, 148 (S. D. N. Y.), affirmed 92 F. (2d) 585-592 (C. C. A. 2), affirmed 303 U. S. 419; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 47-48.

The *Los Angeles* case involved a final valuation order of the Interstate Commerce Commission. The plaintiff railroad pointed out (p. 304) that the Commission had valued its property at an amount less than its outstanding liabilities in mortgage

bonds; that the ordinary conduct of its railroad business required continued expenditures for additions and betterments, and alleged that it could not raise additional capital by public borrowing, or subscription to stock, in the face of the valuation. Accordingly, the plaintiff urged that (p. 314): "Since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." This Court held that such injury did not make the order reviewable.

The same type of situation is presented here. The Commission has promulgated regulations embodying the policy which it intends to apply in its licensing function. If licensees, despite the assurances the Commission has given them that they may litigate the validity of the regulations without fear of loss of license, nonetheless refrain from entering into affiliation contracts which do not conform to the rules, their action must be considered an incidental consequence of the regulations of the same type as that involved in the valuation order in the *Los Angeles* case.

If the fact that the regulations may have some effect on NBC and CBS were held sufficient to confer jurisdiction on the courts, the presumable result would be that few policy declarations of any federal regulatory agency, whether embodied in regulations, opinions, or otherwise, would be im-

immune from injunctive attack. The magnitude of the task which would be thrown on the courts by any such relaxation of the prerequisites hitherto prevailing for judicial review, and the corresponding breakdown of administrative process which would ensue, adequately explain why the courts have insisted that administrative action be final in nature before judicial review is available.

4. *The argument of appellant Columbia that there may be no administrative proceeding in which it may contest the Commission's regulations is merely theoretical and, in any event, irrelevant.—*

In addition appellant Columbia suggests (Br. pp. 27-30, 32-33) that the opportunity may never arise for them to participate in subsequent administrative proceedings. This argument is predicated on the assumption that it is possible that no station will challenge the regulations or that if any station does contest, appellant networks will not be permitted to intervene. Neither of these assumptions is warranted.

CBS suggests (Br. 27-30) that its affiliated stations might all fail to contest the Commission's order and in that event there would be no administrative proceedings in which CBS could intervene. NBC is not in a position to make such a contention because two of its affiliates have demonstrated their willingness to litigate by joining as co-plaintiffs in this injunctive suit. And indeed, there is no reason to suppose that stations will not

litigate.⁵⁰ The volume of litigation in which Commission orders have been attacked does not suggest any fear on the part of licensee⁵ that they would thereby incur the Commission's displeasure.⁵¹

⁵⁰ It is difficult to believe that CBS seriously fears that none of its affiliates will litigate. In this connection, it should be noted that CBS joined in appellant's proposal (referred to in the NBC brief at p. 48) that the Commission voluntarily stay the chain broadcasting regulations "pending a determination of its power in a test licensing proceeding and appeal therefrom under Section 402 (b)." Of course, CBS could not have made such an offer had none of its affiliates been willing to contest the validity of the rules.

⁵¹ The Commission's reported decisions show that since 1934 there have been 1,721 instances where licensees have litigated before the Commission with respect to matters other than their own applications. Similarly, there have been 55 instances during the last eight years where licensees have appealed to the courts on such matters.

Furthermore, the theory of Section 402 (b) (2) of the Communications Act, as stated in *Federal Communications Commission v. Sanders Radio Station*, 309 U. S. 470, and in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 62 S. Ct. 875, is that persons other than applicants, who are aggrieved or adversely affected by Commission action on the applications of others, are the very persons who are expected to litigate such action in order to protect the public interest by laying bare errors of law in the Commission's decisions. In the usual case, such aggrieved persons will be other licensees, and indeed they were licensees in the two cases cited above, and were licensees or applicants in the 55 cases cited above, where the appeals were taken under section 402 (6) (2). If one were to take seriously Columbia's argument (Br. 30) that stations are reluctant "to incur the displeasure of the Commission," the procedure thus devised by the Congress would be brought to naught.

The Commission's Minute of October 31, 1941, assures them that they may contest the regulations both before the Commission and in the Court of Appeals without jeopardizing their right to stay on the air.

But assuming that some licensees will contest, CBS further argues (Br. pp. 32-33) that there is no assurance that they will be permitted to intervene. However, under the Commission's intervention rule (Regulation 1.102, p. 25, n. 37, *supra*), as a matter of administrative practice "persons in a position similar to that of the networks have either been made parties in Commission proceedings or have been permitted to intervene therein."

⁵² See, e. g., Petition of Glen D. Gillett and G. S. Wassmer to intervene in the hearing on application of E. J. Regan and F. Arthur Bostwick, d/b as Regan and Bostwick for renewal of license (Docket 5788); Petition of Glen D. Gillett to intervene in hearing on application of John H. Stenger, Jr., for renewal of license (Docket 5430); Petition of Voice of Alabama, Inc., to intervene in a hearing on application of WAPI for renewal of license (Docket 5821); Petition of Southern Broadcasting Stations, Inc., to intervene in hearing of Georgia School of Technology for renewal of license (Docket 5903); Petition of John H. Perry to intervene in hearing on revocation of license of Panama City Broadcasting Company (Docket 6001); and Petition of John H. Perry to intervene in hearing on revocation of license of Ocala Broadcasting Co. (Docket 6000).

⁵³ The court below stated that an unreasonable refusal of a petition to intervene would be a good objection on appeal under Section 402 (b) (2), (NBC R. 438; CBS R. 462); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, cited in the CBS brief (p. 33), contains nothing to the contrary.

Even indulging the theoretical assumption that no Columbia affiliate whatsoever will contest the regulations, there would be no basis for taking jurisdiction of these suits. The administrative remedy is open to the licensees, upon whom the regulations directly operate; and the administrative process has not been completed. In such circumstances courts will not, by intervention at an early stage, prevent an orderly conclusion of the administrative processes, even though incidental injury may be suffered in the interim. See cases *supra*, page 42. No analogy can be drawn to such cases as *Pierce v. Society of Sisters*, 268 U. S. 510, and *Truax v. Raich*, 239 U. S. 33. For in those cases the challenged statutes were penal and contained no provision whereby those whose conduct was made criminal might test the validity or applicability of the statutes through further administrative proceedings. Hence, it was held that suits in equity might be maintained by parties sufficiently affected. Cf. *Ex Parte Young*, 209 U. S. 123." In

"Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger-rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and, upon conviction, to a fine of \$5,000 and imprisonment for five years. It is

contrast, the Communications Act and the Commission's Minute referred to above offer a ready method whereby the rules can be tested by the licensees directly affected without peril to themselves.⁵⁵

5. *Lack of finality is an insuperable obstacle to judicial review of the regulations at this time, whether in a statutory court or before a single district judge.*—Both of the appellants appear to be under the impression (NBC Br. 23-25, 37; CBS Br. 23-24, 35, 42) that the Government's position hinges upon a notion that the statutory court lacks jurisdiction because the regulations, for some reason other than lack of finality, do not fall within the meaning of the term "any order" as used in the Urgent Deficiencies Act. We make no such contention. On the contrary, the Government's po-

true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk." *Ex Parte Young, supra*, at pages 163-164.

⁵⁵ "The Act makes such careful provision for judicial review of the orders of the Commission and for postponing the incidence of penalties or other liabilities until after such review can be had, that there could never be occasion for invoking in respect to this statute the doctrine of *Ex Parte Young*, 209 U. S. 123." Mr. Justice Brandeis, dissenting, in *Pennsylvania v. West Virginia*, 262 U. S. 553, 613, 614.

sition is that the regulations have no immediate legal effect, that "the conventional requisites of equity jurisdiction" are not present,⁵⁶ and that therefore no court—be it a statutory court under the Urgent Deficiencies Act or a single judge sitting in equity—would have jurisdiction at the present stage of the proceedings.

Indeed, if the regulations were sufficiently final to be the subject of judicial review at this time, we believe that such review could be had only in a three-judge court under the Urgent Deficiencies Act, which contemplated that the parties in such cases be entitled to the protection involved in the participation of three judges and the benefits of the expeditious procedure prescribed by that Act.⁵⁷ This procedure and these safeguards were provided for suits to set aside orders of the Interstate Commerce Commission by the Hepburn Act of 1906, 34 Stat. 584, 590-592, which made applicable to such suits the provisions of the Expediting Act of 1903, 32 Stat. 823, for three-judge circuit courts and direct appeal to the Supreme Court. The Mann-Elkins Act of 1910, 36 Stat. 539, transferred

⁵⁶ See *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 132.

⁵⁷ The opinion of the court below suggests but does not decide that the appellants might obtain review before a single judge sitting in equity, presumably in the United States District Court for the District of Columbia (NBC R. 435-436; CBS R. 460).

jurisdiction of such suits from the circuit courts to the Commerce Court where similar protection was provided. In 1913 the Commerce Court was abolished and its jurisdiction over such suits was transferred by the Urgent Deficiencies Act to three-judge district courts, 38 Stat. 208, 219-221. The legislative history of these acts indicates that Congress considered *all* suits to set aside Interstate Commerce Commission action of sufficient national interest and public importance⁸⁸ to warrant review in the first instance by a court of three judges (or the Commerce Court of five judges) and a direct appeal to the Supreme Court.⁸⁹ Nowhere in the

⁸⁸ In *United States v. Griffin*, 303 U. S. 226, it is suggested (pp. 233, 234) that jurisdiction under the Urgent Deficiencies Act extends only to cases of "public importance." While we find no indication in the legislative history that Congress intended to exclude, as unimportant, cases which would otherwise fall within the scope of the Urgent Deficiencies Act, the question is clearly academic in the present case, which is admittedly of public importance.

⁸⁹ *Expediting Act*: H. Rep. 3020, 57th Cong., 2d sess., pp. 1-2; 36 Cong. Rec. p. 1679; H. Rep. 1416, 61st Cong., 2d sess., p. 1.

Hepburn Act: H. R. 12987, 59th Cong., 1st sess., as introduced on January 24, 1906; H. Rep. 591, 59th Cong., 1st sess., p. 5; S. Rep. 1242, 59th Cong., 1st sess., pt. I, pp. 1-4, pt. II, pp. 8-9; 40 Cong. Rec. 1769, 1982, 3446-3447, 4444, 4563-4566, 6320, 6501 et seq., 6691-6692.

Mann-Elkins Act: H. R. 17536, 61st Cong., 2d sess., as introduced on January 10, 1910; H. Rep. 923, 61st Cong., 2d sess., pp. 1-7; S. 6737, 61st Cong., 2d sess.; S. Rep. 355, 61st Cong., 2d sess., pp. 1-7; 45 Cong. Rec. p. 3467-3468, 4572-4573, 5232; President Taft's Special Message to Congress, January 7, 1910; Hearings, H. Committee on Inter-

legislative history of these acts is there any indication that Congress intended to leave any class or group of suits to set aside action of the Interstate Commerce Commission in the hands of a single judge and subject to the longer procedure of appeals via the circuit court of appeals. The adoption of the provisions of the Urgent Deficiencies Act by section 402 (a) of the Communications Act indicates the intent of Congress to provide the same procedure in all suits to set aside Federal Communications Commission action, except those which may be reviewed in the Court of Appeals under section 402 (b).

The only case in which a one-judge court has been held to have jurisdiction after a court established under the Urgent Deficiencies Act has been held to be without jurisdiction, is *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. In that case a finding of the Interstate Commerce Commission that the railroad was not an interurban road, and was therefore subject to the Railway Labor Act, was reviewed after it had been held in *Shannahan v. United States*, 303 U. S. 596, that such a determination was not an order within the meaning of the Urgent Deficiencies Act. The *Shannahan* case rested in part on the view that the determination

state Commerce, 61st Cong., 2d sess., pt. XXII, pp. 1257-1260; Hearings, S. Committee on Interstate Commerce, S. 3776 and S. 5106, 61st Cong., 2d sess., pp. 201-204.

Urgent Deficiencies Act: 48 Cong. Rec. pp. 7955-7956.

was an interim step preliminary to further administrative action by the Mediation Board. See *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 130. To the extent that the *Shannahan* case relied on *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 412 and the negative order doctrine generally, it is, of course, overruled by this Court's decision in the *Rochester* case.

If official action by the Interstate Commerce Commission or other agency may, as the *Shannahan* and *Shields* cases taken together suggest, sometimes be reviewed in a statutory court and some times before a single district judge, the whole purpose of the Urgent Deficiencies Act is frustrated. Particularly is this true in any situation where there is doubt as to which is the proper court, since, contrary to the purpose of that act, enforcement of orders is then exposed to the possibility of double delay where a restraining order or injunction is obtained from the wrong court, and, after a subsequent dismissal of the bill for lack of jurisdiction, a temporary injunction is obtained from the proper court.

In any event, it is our position that the reasons which preclude attack upon the regulations in this case would apply to any equity proceeding, whether in a statutory three-judge court or before a single district judge. As shown heretofore, the rules are not final but are declarations of policy to be applied in subsequent administrative pro-

ceedings and accordingly are not subject to attack in any equity case.

6. *Review of the regulations under Section 402 (b) is the appropriate method.*—As this Court said in *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138, underlying the whole Communications Act there is “recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.” This principle is no less important with respect to the network operations of broadcast stations than with respect to their other services. Recognizing the importance of this principle in evolving for the first time policies in the chain broadcasting field, the Commission did not undertake to frame regulations carrying penal consequences and which would have required immediate revision of affiliation contracts under the threat of criminal penalties. Instead, it framed regulations which would serve as a guide to applicants and other interested parties, stating the policies which it proposed to implement and develop in the course of its licensing functions. As has been shown (see p. 35, *supra*), this is a customary procedure; the Commission has often resorted to regulations of this sort in the broadcasting field. Commission action granting or denying licenses pursuant to such rules has often been challenged in the Court of Appeals for the District of Columbia un-

der the specific statutory provisions for review of such action, but such rules have never before been attacked by a suit in equity for an injunction and, so far as we are aware, no analogous suit has ever been entertained by the courts.

To be sure, the Commission believes that the regulations here attacked are warranted by the evidence produced by its investigation, and will serve public interest, convenience, and necessity. There is a strong likelihood that they will be followed in proceedings on particular license applications. But there is no warrant for the suggestion in appellants' briefs that the regulations will be applied inflexibly, that amendments will not be made upon convincing showing, or that the further administrative proceedings in which they are to be applied are a mere formality.

It is settled that "one who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal." *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 616; *Lehon v. Atlanta*, 242 U. S. 53, 56; *Bourjois Inc. v. Chapman*, 301 U. S. 183, 188; *Pacific Tel. Co. v. Seattle*, 291 U. S. 300, 303-304. As shown by the Supplemental Report (NBC R. 201-217; CBS R. 20-36), the rules have already been substantially modified as a result of a petition by the Mutual Broadcasting System. Likewise, the Commission's Reports and its Minute make it perfectly clear that in the future administrative proceedings

the reasonableness of applying the rules in the particular case will be fully considered.⁸⁰ Indeed, appellant Columbia declares in its brief (p. 9) that the manner in which Regulation 3.105 is applied is determinative of the reasonableness of the rule. Since the rules can only be applied on a case-to-case basis, it is not only appropriate but highly desirable that any court review of the regulations be on the same basis. Such review is available in the Court of Appeals for the District of Columbia under Section 402 (b) of the Act.

In contrast, these suits are an endeavor by the appellants to secure from the courts a general declaration that the chain broadcasting regulations are invalid. See dissenting opinion of Mr. Justice Brandeis in *Pennsylvania v. West Virginia*, 262 U. S. 553, 610. Cf. *Ashwander v. Tennessee Valley*

⁸⁰ *Supra*, pp. 26, 28. Both the Report and the Supplemental Report point out that the application of the regulations with respect to regional networks will be largely governed by the facts shown in future proceedings. (NBC R. 115, 212; CBS R. 31-32, 135.)

To illustrate further that the administrative proceedings are substantial and not merely formal, it may be supposed that licensees in some of the larger cities with five or more radio stations request that the rule against exclusive affiliation (3.101) or the option-time rule (3.104) be waived or modified as applied to them. Some of the reasons which underlie each of these rules are of peculiar importance in cities with four or less stations. (*Supra*, p. 16.) If a convincing showing were made of the need for modification or waiver of these regulations in such cases, the Commission would, of course, be governed accordingly.

Authority, 297 U. S. 288; *Electric Bond & Share Co. v. Securities Exchange Commission*, 303 U. S. 419, 443. While the rules embody general policies, the policies may not be found appropriate in particular cases. Appellants challenge the reasonableness of the rules, but the rules may be reasonable as applied to one applicant and unreasonable as applied to another. Accordingly, not only would the entertainment of these suits be contrary to established principles of jurisdiction, as shown heretofore, but the court below is not the proper forum for review of the type of rules which the Commission has promulgated.

Furthermore, if the Chain Broadcasting Regulations may be attacked in equity on an over-all footing, it is difficult to see why all other general policy declarations of this Commission—or indeed of other agencies—may not also be so attacked. It would seem equally possible, for example, for an aggrieved manufacturer of radio equipment holding a contract with a licensee or applicant, or other interested party, to attack the Commission's general allocation plan,⁶¹ or the policy which it has declared with respect to the authorization of new or improved broadcast facilities during the period of war emergency.⁶²

⁶¹ *Supra*, pp. 8-10.

⁶² *Supra*, pp. 29-30.

The entertainment of these suits, accordingly, would seriously impede the development of intelligent and responsible administrative processes by impelling administrative agencies not to disclose by general statements or pronouncements, in advance of case by case adjudication, the policies which they intend to follow. The Government believes that the formulation and publication of administrative policies is advantageous not only to those who do business with an agency but to the agency itself." To hold that such policies may be attacked on a sweeping basis prior to their application in particular cases would choke off this beneficial administrative trend.

* See *Final Report of the Attorney General's Committee on Administrative Procedure*, pp. 26-27:

"Most agencies develop approaches to particular types of problems, which, as they become established, are generally determinative of decisions. Even when their reflection in the actual determinations of an agency has lifted them to the stature of 'principles of decision,' they are rarely published as rules or regulations, though sometimes they are noted in annual reports or speeches or press releases, as well as in the opinions disposing of particular controversies. As soon as the 'policies' of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form."

CONCLUSION

It is respectfully submitted that the judgments of the district court should be affirmed.

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APRIL 1942.

APPENDIX

A. COMMUNICATIONS ACT OF 1934, AS AMENDED

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SECTION 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision

complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention

to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending

upon the nature of the issues involved upon said appeal and the outcome thereof.

B. THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913,
38 STAT 219, AS SET FORTH IN 28 U. S. C. § 47

Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the

order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

C. THE CHAIN BROADCASTING REGULATIONS

SEC. 8.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network or

ganization¹ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.*

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for

¹ The term "network organization" as used herein includes national and regional network organizations.

*Regulation 3.102, as originally promulgated, read as follows:

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization."

renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.*

SEC. 3.104. Option time.—No license shall be granted to a standard broadcast station which options² for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours³ within each of four segments of the broadcast day, as herein described. The

*Regulation 3.103, as originally promulgated, read as follows:

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: Provided, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period."

²As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled; or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

³All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight-saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m.⁴ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.**

SEC. 3.105. Right to reject programs.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

⁴ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight-saving time or vice versa.

**Regulation 3.104, as originally promulgated, read as follows:

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control⁵ with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided*, That, with

⁵ The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; *And provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.*

D. THE MINUTE OF OCTOBER 31, 1941

PROCEDURE IN DOCKET NO. 5660

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket

*This paragraph, as originally promulgated, read as follows:

"These regulations shall become effective immediately: *Provided, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: Provided further, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.*"

Interim postponements were made on July 22, 1941 and August 28, 1941.

No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1025-1026.

NATIONAL BROADCASTING COMPANY, INC.,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND
STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,
Appellants,

v.

THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant

v.

THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

On Appeal from the District Court of the United States for
the Southern District of New York.

**BRIEF OF MUTUAL BROADCASTING SYSTEM, INC.,
INTERVENOR.**

LOUIS G. CAUDWELL,
LEON LAUTERSTEIN,
EMANUEL DANNETT,
PERCY H. RUSSELL, JR.,
Counsel for Intervenor.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1025-1026.

NATIONAL BROADCASTING COMPANY, INC.,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND
STROMBERG-CAILSON TELEPHONE MANUFACTURING COMPANY,
Appellants,

v.
THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.
THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

On Appeal from the District Court of the United States for
the Southern District of New York.

BRIEF OF MUTUAL BROADCASTING SYSTEM, INC.,
INTERVENOR.

INTRODUCTORY.

The opinion below, jurisdiction, question presented, and statutes involved are sufficiently set forth in the Government's Brief. For convenient reference (because of the contentions made in Point III of this brief) we have set forth Section 4(i) of Title I, Sections 303, 305(a), 308(b), 312(a), 315, 319(a), and 325 (b) and (c) of Part I of Title

III, Section 502 of Title V, and Section 606(c) of Title VI of the Communications Act of 1934, 47 U. S. C. §§151 *et seq.*, in the Appendix.

STATEMENT.

Mutual Broadcasting System, Inc., intervened in both cases below as a defendant (NBC, R. 431; CBS, R. 455). Mutual participated in the original proceedings before the Commission (Report on Chain Broadcasting; NBC, R. 29 *et seq.*; CBS, R. 49 *et seq.*) and, in addition, after the Commission's Order of May 2, 1941, filed a petition with the Commission requesting certain amendments to the regulations. As a result of this petition, and the ensuing oral argument and briefs, the Commission made its Supplemental Report and Order of October 11, 1941 (NBC, R. 201; CBS, R. 20). No petition, proposal or other request for amendment of the regulations involved has been made by either appellant, their position having been that the Commission had no power or jurisdiction to promulgate any of the regulations.

So far as the proceedings and the facts are relevant to these appeals, they have been adequately summarized in the Statement in the Government's Brief.

The interest of Mutual in the subject-matter is shown in that Statement, and in the Commission's Report on Chain Broadcasting, *supra*. It is shown in greater detail in the affidavit of Fred Weber, its general manager, filed in the court below in opposition to appellants' motions for temporary injunction (NBC, R. 263; CBS, R. 347). The irreparable injury to Mutual, as the fourth and youngest national network organization, which has occurred and is continuing to occur through the maintenance of the restrictive provisions in appellants' network-affiliate contracts; the virtually insuperable obstacles which these restrictive provisions place in the way of the establishment of any new national network by barring access to a large number of important markets in the United States where there are three or less full-time broadcast stations; and the resulting

impairment in the service rendered to the public because of the foreclosing of competition, because of the limitations on the independence of broadcasters, and because of the decreased revenue to many such broadcasters—all are abundantly shown in the Commission's Report (NBC, R. 34 *et seq.*; CBS, R. 46 *et seq.*) and in Mr. Weber's affidavit (see, particularly, NBC, R. 278 *et seq.*, CBS, R. 362 *et seq.*), and indeed, have never been seriously controverted.

SUMMARY OF ARGUMENT.

The order complained of is not a reviewable order under Section 402(a) of the Communications Act for reasons which may be grouped under three headings:

I. The order does not satisfy the primary jurisdiction doctrine formulated in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139. Resort to the courts in the situation presented by the order "is either premature or wholly beyond their province" (p. 130).

It is *premature* because the order brings no sanctions into play and because it adversely affects such rights as appellants may have only on the contingency of future administrative action, namely, action on applications for renewal of license. The procedural and appeal provisions of the Act applicable to such action, and the regulations governing practice and procedure before the Commission, afford adequate and legally sufficient safeguards for the rights of appellants.

It is *wholly beyond the province of the courts* because the order constitutes only a declaration of policy of legislative character but falls short of being an actual exercise of legislative power. It does not, therefore, present a justiciable controversy.

Appellants have no judicially cognizable right to be protected against such adverse effects as may result from inchoate administrative action of this character.

II. If it be assumed that the order satisfies the primary jurisdiction doctrine, the order is of purely legislative char-

acter and is therefore not reviewable under the statutes involved.

The test of what is "legislative" is not whether the action looks to the future, but whether the action puts into effect a general rule without reference to any particular case. Decisions of this Court seeming to adhere to the former test are, with the exception of one class of cases, readily distinguishable. The exception (treating of orders requiring periodic reports or prescribing uniform accounting systems) is justifiable on other grounds.

Important considerations of public policy are involved. Opinions differ as to the character and extent of supervision (administrative or judicial) which should be provided over the purely legislative determinations of administrative agencies; it is a most difficult problem of political science. Congress should not be deemed in 1913 (or before), or in 1934, to have intended a result equivalent to that sought by the recent highly controversial Walter-Logan Bill. The problem, affecting many agencies and a vast accumulation and annual output of substantive rules and regulations, should be left to Congress to solve.

III. In any event, Section 402(a) does not extend to the purely legislative determinations of the Federal Communications Commission under Title III of the Communications Act.

The Urgent Deficiencies Act has been held not to extend to certain orders, even though final in character. *United States v. Griffin*, 303 U. S. 226. It is a matter of the intent of Congress.

Section 402(a) should be limited (1) to those orders under Title II of the Act which are analogous to reviewable orders of the Interstate Commerce Commission, and (2) to those orders under Title III which are quasi-judicial and not subject to Section 402(b). This is supported by evidences of the intent of Congress in the legislative history of the Act and in the provisions of Title III; by the history and contents of the Radio Act of 1927, which was

taken over almost verbatim in Title III, and the omission of the Radio Act of 1927 to provide for any judicial review of such legislative determinations; by the experience of some 15 years under that Act and under Title III, during which administrative action on applications and judicial review under Section 402(b) has proved an adequate method of testing the Commission's assertions of regulation-making authority; and by the nature, wide variety and importance of the regulations which the Commission is authorized to promulgate, together with the large number of persons affected.

ARGUMENT.

I.

The Order Complained of is not a Reviewable Order Because it Does Not Satisfy the Test of the Primary Jurisdiction Doctrine.

In general, we agree with the contentions made in the Government's Brief: "these suits are premature because the regulations have no immediate effect but are mere declarations of policy to be applied in future administrative proceedings." We agree, also, with the position that "the conventional requisites of equity jurisdiction are not present" and that no court, whether a statutory court under the Urgent Deficiencies Act or a single judge sitting in equity, would have jurisdiction, either at this time or at any time as long as the regulations are maintained in their present form as mere declarations of policy. We do not agree with the apparent concession that a purely legislative determination, particularly such a determination under Title III of the Communications Act, is reviewable if it satisfies other tests, and shall discuss this matter separately under Points II and III of this brief.

The facts and circumstances showing that resort to the courts in the instant cases was "either premature or wholly

¹ *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 132.

beyond their province," and that the order complained of does not satisfy "the primary jurisdiction doctrine"² are reviewed at length in the Government's Brief, and need only be summarized:

1. The phraseology of the Commission's order (simply adopting the regulations), and of the regulations revealing each on its face that it is simply a declaration of policy to be applied in future administrative proceedings, namely, proceedings under Section 309(a) of the Communications Act with respect to applications for renewal of license (NBC, R. 127, 213, 217; CBS, R. 17, 32), confirmed by the express language of the Commission's Report of May 2, 1941 (NBC, R. 121; CBS, R. 141).

2. The assurance afforded by the express language of Section 309(a) that any future administrative proceedings must include notice and a full and fair hearing on the quasi-judicial model, with the right to intervene accorded to interested parties both by necessary implication of the statute and by the Commission's regulations, before any declaration of policy contained in the order can possibly achieve any legal effect, and with the right to petition for rehearing under Section 405 of the Act.

3. The adequacy of the judicial remedy afforded both to the applicant and to any interested intervenor by Section 402(b), in the event the declaration of policy is applied and the renewal application is denied.

4. The assurance afforded by the Commission's Minutes of October 31, 1941 (NBC, R. 379; CBS, R. 453), that any renewal applicant desiring to contest the validity of the regulations, *or the reasonableness of their application to his particular station*, will be protected against injury pending the proceedings and appeal, and even against ultimate loss of license.

² *Rochester Telephone Corp. v. United States*, *supra*, pp. 130, 139.

5. The certainty that there will be future administrative proceedings in which National and Columbia will have full opportunity to intervene and to be heard both before the Commission, the United States Court of Appeals and, on certiorari, this Court—due to the fact that at least two licensees (appellants Woodmen of the World and Stromberg-Carlson³) will surely desire to contest the validity of the regulations, or the reasonableness thereof as applied to their stations, together with the inherent probability that other licensees, affiliates of both National and Columbia, will elect to do likewise.

Appellants' miscellaneous contentions bearing on the foregoing have been adequately discussed in the Government's Brief.

The relevant considerations and authorities have been so recently and so thoroughly canvassed in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, that it is unnecessary to discuss the cases at length. After enumerating the three categories in which this Court's prior decisions involving the "negative order" doctrine fall, this Court (through Frankfurter, J.) said:

"In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a

³ In the complaint, these appellants alleged that the regulations would result in "loss of revenue . . . in an amount in excess of \$100,000 per year each" (NBC, R. 12). In affidavits filed in the court below, they amplified the allegations of apprehended irreparable injury (NBC, R. 254, 258).

challenge to its jurisdiction,⁵ or rendering a tentative⁶ or final valuation⁷ under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable.⁸

"The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a 'final valuation' under the Valuations Act [March 1, 1913, 37 Stat. at L. 701, chap. 92, 49 U. S. C. A. §19a]: 'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.' *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310.

"Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article 3 of the Constitution by what is implied from the grant of 'judicial power' to determine 'Cases' and 'Controversies,' Art. 3, § 2, U. S. Constitution.⁹ Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been

⁵*United States v. Illinois C. R. Co.*, 244 U. S. 82. Compare *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375."

⁶*Delaware & H. Co., v. United States*, 266 U. S. 438."

⁷*United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299."

⁸*Shannahan v. United States*, 303 U. S. 596; compare *Shields v. Utah Idaho C. R. Co.*, 305 U. S. 177, 182-184, *ante*, 170."

⁹*Hayburn's Case*, 2 Dall. 409, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, *United States v. Ferreira*, 13 How. 40; *Muskat v. United States*, 215 U. S. 346."

loath to authorize review of interim steps in a proceeding¹⁰" (pp. 130-131).

After analyzing the other two categories, this Court continued:

"From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked²²" (p. 139).

To the cases cited in the foregoing may be added the following unsuccessful attempts to secure review under the Ur-

¹⁰ Prior to § 7 of the Act of March 3, 1891, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by § 6 of the Act of April 29, 1802. See *United States v. Bailey*, 9 Pet. 267. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. Section 237, Judicial Code, as amended, 28 U. S. C. A. § 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. Sections 129 and 238 of the Judicial Code as amended, 28 U. S. C. A. §§ 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted."

²² See also, e. g., *Baltimore & O. R. Co. v. United States*, 215 U. S. 481; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506; *United States v. Pacific & A. R. & Nav. Co.*, 228 U. S. 87; *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138; *Northern P. R. Co. v. Solum*, 247 U. S. 477; *Director Gen. v. Viscose Co.*, 254 U. S. 498; *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456; *Western & A. R. Co. v. Georgia Pub. Serv. Commission*, 267 U. S. 493; *Midland Valley R. Co. v. Barkley*, 276 U. S. 482; *Railroad Comrs. v. Great Northern R. Co.*, 281 U. S. 412. The doctrine has been given general application, e. g., *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Compare, also, *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337."

gent Deficiencies Act because of the lack of finality in the Commission's order, *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, and *Brooklyn Eastern District Terminal v. United States*, 28 F. 2d. 634, or because the order, though final, was not intended by Congress to be within the scope of the judicial review provided, *Great Northern R. Co. v. United States*, 277 U. S. 172, and *United States v. Griffin*, 303 U. S. 226. See also *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401.

Other cases to the same effect, arising in equity but not under the Urgent Deficiencies Act, where relief was denied because prematurely sought, include *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 616-7, aff'g 16 F. Supp. 575; *P. F. Petersen Baking Co. v. Bryan*, 290 U. S. 570, 575-6; *Porter v. Investors Syndicate*, 286 U. S. 461, 468; and *John P. Agnew & Co. v. Hoage*, 99 F. 2d. 349, 351. Particularly conclusive against the right of appellants Woodmen of the World and Stromberg-Carlson (in No. 1025) to relief under Section 402(a) when a plainly adequate remedy is available under Section 402(b) are *Black River Valley Broadcasts, Inc. v. McNinch, et al.*, 101 F. 2d. 235 (App. D. C.), cert. den. 307 U. S. 623; *Monocacy Broadcasting Co. v. Prall et al.*, 90 F. 2d. 421 (App. D. C.); *Sykes et al. v. Jenny Wren Co.*, 78 F. 2d. 729, 732 (App. D. C.), cert. den. 296 U. S. 624.

As was stated by this Court in *Highland Farms Dairy, Inc. v. Agnew, supra* (p. 616),

"One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon v. Atlanta*, 242 U. S. 53, 56; *Smith v. Cahoon*, 283 U. S. 553, 562. He should apply and see what happens."

To the same effect, see *Porter v. Investors Syndicate, supra*, p. 468. Similarly, a person aggrieved by a regulation of the Commission should seek relief (as Mutual did successfully in this very proceeding) by applying to the Commission. *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394-5; *P. F. Petersen Baking Co. v. Bryan*, 290

U. S. 570, 575-6. The Commission's rules and regulations contemplate, and expressly provide for, petitions by any person for revision or modification of any of its rules and regulations and, in appropriate cases, for hearings on such petitions. Rule 1.72(c).

Under this heading we are concerned primarily with the fact that appellants' suits were premature. Even, however, were the suits to be regarded as not vulnerable because of prematurity alone, they would still be defective in that

"resort to the court in these situations is * * * wholly beyond their province."

In part, this is because, to the extent the regulations are final, they are purely legislative (a matter discussed under Point II below), and, to the extent they fall short of being legislative, they constitute statements of governmental policy with which the courts will not interfere. In *United States v. Los Angeles & S. L. R. Co.*, *supra*, this Court said,

"No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction" (pp. 314-5).

As stated in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324 (Hughes, C. J.),

"The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons com-

⁴ *Rochester Telephone Corp. v. United States*, *supra*, p. 130.

plaining. The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States*, 219 U. S. 346, 361; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74; *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274, 289; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 262, 264" (p. 324).

See also *New Jersey v. Sargent*, 269 U. S. 328; *New York v. Illinois*, 274 U. S. 488; *United States v. West Virginia*, 295 U. S. 463, 474, and *Arizona v. California*, 283 U. S. 423, 462, cited in the same opinion; the dissenting opinion of Brandeis, J., in *Pennsylvania v. West Virginia*, 262 U. S. 553, 610; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355; *Perkins v. Lukens Steel Co.*, 310 U. S. 113. In *Electric Bond & S. Co. v. Securities Exchange Commission*, 303 U. S. 419, this Court stated (Hughes, C. J.),

"Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts" (p. 443).

See also *Carolina Aluminum Co. v. Federal Power Commission*, 97 F. 2d 435 (C. C. A. 4).

If, notwithstanding the safeguards afforded by later administrative proceedings, there is a possibility that, pending the contests over the wisdom or legality of the Commission's ultimate application of its announced policy, a measure of injury will result to appellants, it is at best conjectural and of a character not properly the subject of judicial cognizance. Insofar as the regulations operate within the sphere of regulatory authority, the network organizations cannot obstruct such regulatory activity on the basis of their private contracts. *Louisville & N. R. Co. v. Molley*, 219 U. S. 467; *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253; *Avent v. United States*, 266 U. S. 127; *United States v. Michigan Portland Cement Co.*, 270 U. S. 521; *Continental Illinois National Bank & Trust Co. v. Chicago Ry. Co.*, 294 U. S. 648, 680; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska*, 313 U. S. 236,

and *The Assigned Car Cases*, 274 U. S. 564. Incidental effects resulting from administrative action frequently do not constitute injury. *United States v. Los Angeles & S. L. R. Co.*, *supra*, p. 314; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 47-8; *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125.

The cases cited by appellants are not apposite. None of them deals with a mere declaration or announcement of policy, much less with a declaration or announcement which, if and when it is applied, may be fully tested in an adequate quasi-judicial proceeding required by statute, which proceeding, in turn, is subject to judicial review provided by statute. All of them have to do with orders which were immediately operative with adverse effect on the rights of the parties complaining, independently of any contingency of future administrative action. Such a case was *Powell v. United States*, 300 U. S. 276. By the order of the Interstate Commerce Commission that a certain tariff filed by a railroad be stricken from the Commission's files,

"The Commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. The tariff was a rule binding the Seaboard to furnish transportation to and from the port for charges under other tariffs applicable to and from the junction. The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date. In effect the order grants the relief sought by the Central's complaint * * *" (p. 285).

In *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, an order of the Commission refusing to permit a merger of power companies was held to be an "order" as to which the power companies were "aggrieved" under Section 313(b) of the Federal Power Act. The order was clearly the equivalent of the second category held to be within the Urgent Deficiencies Act in *Rochester Telephone Corp. v. United States*, *supra*, and the Court's holding needs no further justification than the reasoning there set forth (pp. 132-4).

There remain but two groups of cases cited by appellants; both groups being patently distinguishable from the instant case, in that the orders involved met the test laid down in the *Rochester Telephone Corp.* case.

One group had to do with orders of the Interstate Commerce Commission putting in effect so-called "rules." *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454; *Chicago, R. I. & P. Ry. Co. v. United States*, 284 U. S. 80; and *United States v. Berwind-White Coal Mining Co. (Assigned Car Cases)*, 274 U. S. 564. Whether or not the orders involved in these cases may be regarded as truly "legislative" is a question discussed in Point II, A, 2, of this brief, where it is pointed out that in each case hearing was prescribed by statute, elaborate hearings were actually held, to which all carriers affected were made respondents, and the proceedings were considered and tested by this Court on a quasi-judicial basis. Indeed, in the first two of the cases the Commission's orders were found void. There can be no doubt, however, but that all three orders fully met the jurisdictional test of immediate legal effect, not contingent on any future administrative action. *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, and *Corona Coal Co. v. Southern R. Co.*, 260 U. S. 698, aff'g 266 F. 726, not only do not help appellants' contentions but constitute additional authorities against them on the score of the primary jurisdiction doctrine.

The second group of cases cited by appellants had to do with orders of the Interstate Commerce Commission, and one order of the Federal Communications Commission, prescribing uniform systems of accounts. *American Telephone & Telegraph Co. v. United States*, 14 F. Supp. 121, aff'd 299 U. S. 232; *Kansas City S. R. Co. v. United States*, 231 U. S. 423, and *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194. Again, whatever difference of opinion there may be as to the legislative character of the orders involved in these cases (discussed in Point II, A, 3),

there can be none as to their immediate and final legal effect. The orders operated directly to deprive the carriers of the right to maintain their existing accounting systems and to require them to establish a particular method of accounting, subject to certain penalties. See also *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *Norfolk & W. R. Co. v. United States*, 287 U. S. 134, aff'g 52 F. 2d. 967; and *Atlanta, Birmingham & Coast R. Co. v. United States*, 296 U. S. 33. On the other hand, where the Commission's action in this field has not reached the stage of immediate legal effect, jurisdiction has been denied under the Urgent Deficiencies Act. *United States v. Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522; *Chesapeake & O. R. Co. v. United States*, 5 F. Supp. 7. See also *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561.

There are no reported decisions under the Urgent Deficiencies Act where a court has taken jurisdiction to review any action even remotely resembling the "regulations" adopted by the order involved in this case. An examination of the some 66 orders of the Interstate Commerce Commission, reviewed by the United States Commerce Court during its existence from February, 1911 to December, 1913, shows no instance of any such case (see Opinions of United States Commerce Court). Examinations of the external aids of statutory construction preceding the adoption of the Commerce Court Act (June 18, 1910), of the Urgent Deficiencies Act (October 22, 1913), and of the Communications Act of 1934 (June 19, 1934), do not support, and by necessary implication completely negative, any Congressional intent to subject administrative action of the sort represented by the Commission's order to judicial review.

**The Order Complained of is Not An Order Because of Its
Purely Legislative Character.**

The majority and the minority opinions in the court below agree in the view that it is no answer to an assertion of jurisdiction under Section 402(a), that the decision challenged is "legislative" in character. The briefs of both appellants predicate their contentions on the assumed correctness of this view, as apparently does also the brief for the Government.

This interpretation of Section 402(a) (and, in turn, of the Urgent Deficiencies Act) is, we submit, too broad and, as applied to the administrative order now in question, is erroneous. If applied to the purely legislative functions of the Federal Communications Commission under Title III of the Communications Act, it would introduce a radical innovation in the relations between the Commission and the courts in the regulation of radio-communication, contrary to the intent and expectation of Congress and greatly extending the area of immediate and automatic judicial interference with the Commission's determinations. While the view claims a measure of support in occasional general expressions in this Court's past decisions, the decisions are, we submit, distinguishable.

For the purpose of this discussion we shall assume that the Commission's order is more than a mere announcement of future administrative action, and that, through the medium of general regulations, it authoritatively commands or forbids certain actions on the part of broadcast station licensees, and at once sets in execution some sanction. In other words, the regulations may be considered on exactly the same footing as if, instead of commencing with the words

"No license shall be granted to a standard broadcast station having any contract which . . ."

they commenced with the words

"No licensee of a standard broadcast station shall enter into any contract which . . ."

The conclusion that an order of the Commission, even though purely legislative, may be reviewed under Section 402(a) rests, as we shall attempt to show, on decisions of this Court dealing with orders of the Interstate Commerce Commission and other public utility commissions which, while not purely legislative, were called so. These decisions applied the test of *future operation* as determinative whereas, we submit, the correct test is whether the order puts into effect a *general rule* without reference to any particular case.

Under this latter test (with the possible exception of one class of cases distinguishable on other grounds) the decisions do not support the conclusion. Important considerations of public policy argue against direct judicial interference with purely legislative orders under Section 402(a).

Analysis of decisions of this Court wherein the "future operation" test of legislative character was applied.

Earlier decisions of this Court, in which administrative orders have been pronounced "legislative" and have nevertheless been subjected to review, are, it is submitted, all distinguishable on valid grounds.

The administrative orders to which the characterization has been thus applied fall into three classes:

- (1) Orders prescribing rates.
- (2) Orders adopting "rules" or "regulations" after quasi-judicial proceedings, including notice and hearing, prescribed by statute.
- (3) Orders, pursuant to statutory authority, designed to secure information necessary for the performance of the administrative agency's substantive regulatory functions, such as orders prescribing uni-

form systems of accounts and orders requiring periodic reports.

The principal cases in each class will be briefly analyzed.

(1) *Orders Prescribing Rates*

The notion that the distinguishing features of "legislative" and "judicial" are that the former looks to the future and the latter to the past, may be traced largely, although not entirely, to decisions on rate regulation. The leading and most frequently cited case announcing this view is *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226. Among later cases following this precedent are *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 8; *Ross v. Oregon*, 227 U. S. 150, 163; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305; *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289; *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 485-6; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 440; *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 263; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 318; *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561, 569; *Hill v. Martin*, 296 U. S. 393, 404; *Morgan v. United States*, 298 U. S. 468, 479; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-2; and *Oklahoma Packing Company v. Oklahoma Gas & Electric Company*, 309 U. S. 4, 10. See also the dissenting opinion of Mr. Justice Field in *Sinking Fund Cases*, 99 U. S. 700, 761, and *Memphis and Little Rock R. R. Co. v. Southern Express Co.*, 117 U. S. 1, 29.

Persuasion to this view, in turn, appears to have been influenced principally by (1)^a the circumstance that the prescribing of rates for the future may be, and in the past frequently has been, by statute enacted by the legislature, or by ordinance enacted by a municipal body having legislative powers, (2) the further circumstance that previously

the courts had entertained actions for damages by shippers against carriers based on alleged unreasonableness of rates, and (3) decisions of this Court construing the original Interstate Commerce Act as not conferring power on the Interstate Commerce Commission to prescribe rates. The sole prior decisions of this Court cited in support of the view in *Prentis v. Atlantic Coast Line Co.* (at p. 226) fall within these descriptions: *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439.

1. The circumstance that historically rates have frequently been prescribed by statutes or ordinances enacted by truly legislative bodies is not determinative. Such enactments were usually of a truly legislative character, general in terms, without reference to any particular case, and affecting the rights of individuals in the abstract. *Munn v. Illinois*, 94 U. S. 113, 132-4; *Peik et al. v. C. & N. W. R. Co.*, 94 U. S. 164, and associated cases; *Baltimore & Ohio R. Co. v. Maryland*, 88 U. S. 456, 471; *Dow v. Beidelman*, 125 U. S. 680; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 344; and *St. Louis & San Francisco R. Co. v. Gill*, 156 U. S. 649. Even in the exceptional cases where enactments by legislative bodies have operated directly and concretely upon individuals, the decisions of this Court can be sufficiently justified on historical grounds, as well as on the well-settled constitutional principle that the Federal Constitution does not require the observance of the separation-of-powers doctrine by the States. Instances of the performance by legislative bodies of what would seem to be judicial functions go back to the enactments involved in such cases as *Calder v. Bull*, 3 Dall. 386, and *Maynard v. Hill*, 125 U. S. 190. That observance of the separation-of-powers doctrine is not required of the States was recognized in *Prentis v. Atlantic Coast Line*, at p. 225, and, of course, in many other cases.

While continuing to characterize the prescribing of rates as "legislative," this Court had, considerably prior to *Prentis v. Atlantic Coast Line*, actually applied the criteria

of judicial proceedings to rate-making by administrative tribunals acting under authority delegated by the legislatures. *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362. In cases too numerous to cite, all the procedural demands of due process have been held applicable to rate-making by such tribunals, including prerequisite notice and hearing, findings based on substantial evidence and confined to evidence contained in the record, the making of basic findings, and various others. See cases cited in the dissenting opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, at pp. 74-5.

This attitude toward the prescribing of rates is to be contrasted with decisions of this Court holding, in effect, that the procedural demands of due process in quasi-judicial proceedings are not applicable to the performance of truly legislative functions by administrative agencies. *Buttfield v. Stranahan*, 192 U. S. 470; *United States v. Grimaud*, 220 U. S. 506; *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *Pacific States Box and Basket Co. v. White*, 296 U. S. 176; *United States v. Bush & Co.*, 310 U. S. 371; *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126.

Acceptance of the test of future against past operation has not been without dissent. In *Prentiss v. Atlantic Coast Line Co.*, Fuller, C. J., in a dissenting opinion, after expressing the opinion that the Virginia State Corporation Commission (which had made the order fixing passenger rates, sought to be enjoined by the carrier) was a judicial court, stated (at p. 237):

"I cannot see why the reasonableness and justice of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards."

Harlan, J., concurring in the general observations of the Chief Justice, went further and said (at p. 238),

"In my judgment, the Virginia State Corporation Commission is, in every substantial sense, a court."

An earlier instance of somewhat the same debate is *Memphis and Little Rock R. R. Co. v. Southern Express Co.*, 117 U. S. 1, in which this Court reversed a decree, which, *inter alia*, had required the defendant railroad company to carry the plaintiff's express matter "at a just and reasonable rate of compensation." The majority (through Waite, C. J.) said (at p. 29),

"The regulation of matters of this kind is legislative in its character, not judicial."

Miller, J., dissenting, stated (at p. 33),

"That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it when it becomes matter of controversy."

Field, J., joined in this dissent.

The fact that rate-prescribing orders of the Interstate Commerce Commission, and of the various state public utility commissions, have usually been directed against one or more named individuals does not appear to have been urged as making the orders "judicial" and not truly "legislative" in character. This may be explained by the circumstance that, in view of the usual statutory procedural provisions and this Court's rulings requiring compliance with procedural due process, no issue turned on the characterizations, and there was no point in pressing the contention.

The fallacy in the test announced in *Pren. v. Atlantic Coast Line Co.*, *supra*, has however, been the subject of frequent comment. Freund, in *Administrative Powers over Persons and Property*, 1928, states (at p. 15):

"The line between powers operative from case to case and powers operative by way of general rule is of course a fluid one, since 'general' and 'particular' are

relative terms. Rate-making illustrates the gradations:"

After enumerating six gradations, he proceeds:

"The U. S. Supreme Court has said that rate-making is a legislative function (211 U. S. 227), having probably in mind the rates from No. 3 on. But for practical purposes, i.e., legislative treatment and administrative procedure, probably only No. 6 is truly legislative."

Similarly, Dickinson, in *Administrative Justice and the Supremacy of the Law*, states:

"Thus, for example, the act of a public-utilities commission in fixing a rate has been held to be 'legislative' for constitutional purposes." From one aspect of juristic analysis, legislative it no doubt is—that is, from the aspect of its future operation and its applicability to a whole class of cases. But the writ of mandamus is future in its operation, and yet is not for that reason regarded as legislative . . ."

2. The further circumstance that the courts had entertained actions for damages by shippers against carriers based on unreasonableness of rates, and had not entertained actions seeking future relief, is likewise not determinative. As pointed out by Bradley, J., in his dissenting opinion in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, at page 462,

"When the rates are not thus determined, (i.e., fixed by the Legislature), they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so

⁵ To the above is appended a footnote which, after citing *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, and *Prentiss v. Atlantic Coast Line Co.*, *supra*, reads in part: "One reason why our courts have held rate-fixing by a commission to be 'legislative' would seem to be because it is a function which legislative bodies have been in the habit of exercising."

declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will."

In awarding damages for the exaction of an unreasonable rate, the court necessarily had first to ascertain what would constitute a reasonable rate for the service rendered. That the available remedy happened to be limited to damages and did not extend to injunction against future continuance of the unreasonable rate (or of any rate in excess of that determined to be reasonable), or to mandamus commanding the establishment for the future of the rate found reasonable, was a matter of historical accident and legislative determination and should not affect the proper classification of the proceeding as "judicial" if the legislature should choose to make the latter remedies also available. In effect, this is what the Congress and the legislatures of the several States have done, by providing the equivalent of injunction and mandamus, namely, cease-and-desist orders against unreasonable rates and orders prescribing rates for the future.

3. The expressions found in this Court's decisions construing the original Interstate Commerce Act, adopting the test of future as against past operation, were unnecessary to the conclusions reached. The decisions were amply justified on the basis of the statutory language involved, under generally accepted principles of statutory construction. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479.

(2) Orders Prescribing Various Acts or Practices

The test of future as against past operation has been extended by this Court from rate-making orders to a number of other kinds of public utility commission orders, future in operation. For example, in *Lake Erie & Western R. Co.*

v. *State Public Utilities Commission of Illinois*, 249 U. S. 422, on complaint by the owner of a grain elevator and coal yard, and after notice and hearing, an order was entered by the Commission against the railroad company directing the railroad company to restore a side track. This order was characterized as "legislative in its nature" (p. 424; see cases there cited). A similar holding was made in *Grand Trunk Western R. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, with respect to an order of the state railroad commission directing the installation and use of an interlocking plant at the crossing of two railroads in that state, and apportioning between them the expense of executing the order. But in *Baltimore & Ohio R. Co. v. United States*, 264 U. S. 258, however, involving an order of the Interstate Commerce Commission permitting a railroad to acquire certain terminal railroads, this Court, through Brandeis, J., said (at page 263),

"Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226."

This was in response to a contention, rejected by the Court, "that this order is not one of those subject to judicial review; and that, if subject to review, it cannot be held void merely because unsupported by evidence" (p. 263).

See also *Southern R. Co. v. Virginia*, 290 U. S. 190, 197.

Included in the orders reviewed under the Urgent Deficiencies Act have been some purporting to adopt "rules" of more general character future in operation. Except, however, for cases dealing with orders requiring periodic reports or prescribing uniform accounting systems, which are discussed separately below, the "rules" were subject to a statutory prerequisite of notice and hearing and were considered by this Court on a quasi-judicial basis, somewhat in

the same fashion as it has considered rate-making orders. In effect, the "rules" were affirmative *orders* directed to a number of persons, all of whom were respondents in the proceeding before the Commission. The mere fact that such orders have been entitled, or have been issued in the form of, "rules" or "regulations" would not, of course, confer on them a legislative character not otherwise possessed.

In *United States v. Berwind-White Coal Mining Co., et al., (Assigned Car Cases)*, 274 U. S. 564, suit had been brought under the Urgent Deficiencies Act to enjoin and annul an order of the Interstate Commerce Commission prescribing, for all railroads subject to its jurisdiction, an "assigned car rule" governing the distribution of cars among bituminous coal mines in times of car shortage. The order was made under paragraph (14) of Section 1, of the Transportation Act, reading in part—

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act * * *" (p. 576).

The Commission initiated the proceeding, and made every carrier subject to its jurisdiction a respondent. Many other persons became parties by intervention. After an extended hearing, the Commission concluded that certain existing practices and other existing regulations of carriers resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices and prescribed the uniform rule in question (p. 572). The persons bringing suit under the Urgent Deficiencies Act had all been parties to the proceeding before the Commission (p. 567).

This Court, through Brandeis, J., stated: "The order here attacked is wholly legislative" (p. 574). It rejected the contention that the Commission did not have authority to prohibit the use of assigned cars by a general rule and, as a matter of statutory construction, held that it did have

such authority. It went on, however, to apply the usual tests of procedural due process, finding "ample evidence to support the Commission's findings," with the following qualification:

"In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general" (p. 583).

It is to be noticed that the opinion tacitly agrees that the evidence supporting the findings must be within the record, thus distinguishing the proceeding from the purely legislative proceeding involved in *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, under a statute which likewise required a hearing.

In *Chicago, R. I. & P. R. Co. v. United States*, 284 U. S. 80, suit had been brought under the Urgent Deficiencies Act to set aside certain rules prescribed by the Interstate Commerce Commission with respect to car-hire settlements. The Commission's order had been made under paragraph (14) of Section 1 of the Transportation Act (p. 91). The Commission had instituted the proceeding; had made all common carriers by railroad in the United States parties respondent; had held elaborate hearings at which a large amount of testimony was taken; and had made two reports. This Court reversed a decree of the lower court dismissing the suit because the Commission's order was "in flat opposition to" one of the findings and resulted in a taking of the use of property without compensation. Stone, J., wrote a dissenting opinion, in which Holmes, J., and Brandeis, J., joined. While the dissenting opinion expressed the view that the judgment of the lower court should be affirmed, it recognized the applicability of the usual tests of procedural due process (p. 117).

In *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, suit had been brought under the Urgent Deficiencies Act to set aside an order entered by the Interstate Commerce Commission under the Boiler Inspection Act. The proceeding had been initiated on complaint of two Brotherhoods, praying that the Commission prescribe rules requiring that all steam locomotives be equipped with power reverse gear or other devices, etc. Practically all the railroads of the United States were made respondents. An extensive hearing was held before an examiner, followed by the hearing of elaborate exceptions before a Division of the Commission. Re-argument before the whole Commission was denied (pp. 457-8). Section 5 of the original Boiler Inspection Act provided in part—

“ . . . after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier” (p. 460).

After finding that the Commission “was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force” (p. 461), this Court, through Brandeis, J., held the Commission’s order void because of the complete absence of the basic or essential findings required to support it (pp. 462-4). Section 14(1) of the Interstate Commerce Act

“does not remove the necessity of making, where orders are subject to judicial review, quasi-judicial findings essential to their constitutional or statutory validity” (p. 465).

(3) *Orders Designed to Secure Information.*

There remain to be discussed the decisions of this Court involving orders requiring the filing of periodic reports, or prescribing uniform accounting systems. Such orders, we believe, furnish the only instances where the administrative action held to constitute an “order” might, with some show of reason, be characterized as truly legislative, since the ac-

tion on some (but not all) occasions was expressed in the form of "regulations" and in some (but not all) was not preceded by quasi-judicial proceedings.

These cases may, we submit, be distinguished on the grounds (1) that the administrative action in each case was of an ancillary type, designed to secure information to enable the agency to perform its substantive regulatory functions, (2) that, while the action took legislative form, only a limited and definitely known number of persons were subject to its requirements, and (3) that, in any event, the scope of judicial review was ultimately so narrowly confined as to leave little ground for interference with the administrative action.

In a sense, this line of cases goes back to *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, which was the only precedent cited on the question by counsel for the Commission in *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (see 55 L. ed. p. 880), and was again cited in the brief filed for the United States in *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194 (see 17 ed. p. 731). In the *Brimson* case, this Court reversed a judgment of the lower court dismissing a petition filed by the Commission invoking the aid of the court in requiring the attendance and testimony of witnesses and the production of documents, books and papers, in a case before the Commission. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 420-1, as later summarized in the *Goodrich* case, through Day, J., (at p. 212),

"dealt with the authority of the Commission to compel the attendance and testimony of witnesses in cases where complaints had not been filed. The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court."

In *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, *supra*, the Commission's order requiring monthly reports was upheld on the ground (Hughes, J.),

"To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to" (p. 622)

the subject-matter to be regulated.

The same justification was voiced in the *Goodrich* case, *supra*, in which orders of the Commission prescribing a uniform system of accounting and bookkeeping for carriers by water upon the Great Lakes, and calling for annual reports from such carriers, were upheld (*Day, J.*):

"If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting * * *. The object * * * is * * * to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business" (p. 211).

This reasoning was followed in *Kansas City S. R. Co. v. United States*, 231 U. S. 423 (see pp. 440, 449). This case came before this Court from a decree of the Commerce Court dismissing a petition to enjoin the enforcement of the Commission's regulations relative to the uniform accounting and bookkeeping system prescribed for interstate railway carriers. The decree was affirmed.

In *United States v. Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522, it was held that a passage in a report of the Commission, which specified the maximum amount that a carrier might include in its accounts as representing an investment in a newly-acquired road, and which notified the company that it would be expected to adjust its accounts accordingly, did not amount to an "order" under the Urgent Deficiencies Act. In an earlier stage, the Commission's action had been set aside because taken without hearing. *Atlanta, Birmingham & Coast R. Co. v. United States*, 28 F. 2d. 885. A hearing was had thereafter, followed by the

report but no formal order. The controversy came up again in *Atlanta, Birmingham & Coast R. Co. v. United States*, 296 U. S. 33, the Commission having in the meantime made an order. This Court affirmed a decree dismissing the suit, saying:

"This Court is without power to weigh the evidence . . . The report of the Commission . . . makes it clear that there was ample evidence to support its finding and order" (p. 38).

Norfolk & W. R. Co. v. United States, 287 U. S. 134, affirmed a decree of a statutory three-judge court dismissing a petition filed under the Urgent Deficiencies Act (52 F. 2d. 967). The petition sought to enjoin enforcement of "an order pursuant to Section 20 of the Interstate Commerce Act, as amended, requiring the Norfolk & Western Railway Company to carry certain coal mining properties in its accounts as not used in the service of transportation" (p. 137). The order resulted from a proceeding which commenced with a request by the railroad company, followed by an *ex parte* order, and an extensive hearing during which the *ex parte* order was suspended. (p. 138). This Court stated (through Roberts, J.):

"One of the prime purposes of § 20 is and has been since the adoption of the Act of 1887, that the carriers' accounts should be uniform, so as to afford the Commission and the public a basis for comparison of their respective operations" (p. 140).

To a contention that "by virtue of the Commission's mandate an unfair and improper rate base is fixed," this Court replied:

"But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its

rights of property. A recapture proceeding is now pending against the appellant, wherein full opportunity will be afforded to present any claims with regard to the inclusion in whole or in part of the mining properties in question.

"We are not convinced by the assertion that the necessary effect of classifying the mines as non-carrier properties is to exclude them from consideration as capital in the issuance of securities. We are not, however, required now to decide this question, for the mere accounting classification can conclude neither the Commission nor the appellant upon the hearing of an application under § 20a (2)" (pp. 141-2).

To a contention that procedural due process was lacking, this Court replied:

"The record demonstrates that an adequate hearing was afforded and due weight given to the evidence" (p. 142).

See the opinion of the court below, 52 F. 2d., at page 970. A somewhat similar case was *Chesapeake & O. R. Co. v. United States*, 5 F. Supp. 7, in which a statutory three-judge court dismissed a bill of complaint brought under the Urgent Deficiencies Act. While a motion to dismiss the bill for lack of jurisdiction was overruled (p. 9), the court applied, in part at least, the criteria of procedural due process (p. 14). An extensive hearing had been held before the Commission, followed by a report, a reopening for further hearing, and an affirmance of the report (pp. 8-9).

In *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, this Court had before it a decree of the District Court in favor of plaintiffs in suits to enjoin the enforcement of certain orders of the state public service commission. One of the orders

"merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any pay-

ments in excess of that price in fixing a rate for domestic consumers" (p. 568).

This Court vacated the decree insofar as it enjoined enforcement of the provisions of that order, saying, in part (through Butler, J.):

"But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them" (p. 569).

This series of cases ends with *American Tel. & Tel. Co. v. United States*, 299 U. S. 232, affirming a decree of a statutory three-judge court dismissing a suit brought under Section 402(a) of the Communications Act and the Urgent Deficiencies Act (14 F. Supp. 121). The suit sought to enjoin the enforcement of an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies. No question appears to have been raised either in this Court or in the court below as to whether the Commission's determination was an "order" within the meaning of the statutes. There had been proceedings first before the Interstate Commerce Commission and later before the Federal Communications Commission, including hearings (14 F. Supp., at p. 124). The lower court went considerably further than had any previous court in this kind of case and, in holding that the order was not void for lack of a report stating the conclusions and findings of fact by the Commission, pronounced the Commission's action as "legislative," and not requiring findings. The Commission was authorized to act "in its discretion" (p. 124). On appeal, this Court's opinion (Cardozo, J.), did not deal with this aspect of the case and confined itself to application of the principle that

"What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' * * * as to be the expression of a whim rather than an exercise of judgment * * *. Then too, in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote" (pp. 236-7).

This was followed by a quotation from the *Goodrich* case, *supra*, to the effect that the object is to be informed so "that it (the Commission) may properly regulate such matters as are really within its jurisdiction" (p. 237).

B. Authorities Supporting the "General Rule" Test of Legislative Character.

In *Douglas v. Noble*, 261 U. S. 165, in sustaining the validity of a state dental practice act, this Court recognized another test as to what is "legislative." Discussing the statute's provisions with reference to an applicant's qualifications, this Court stated (through Brandeis, J.):

"The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill is which fits one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law" (p. 169).

See also *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575, 586-7, affirmed, 300 U. S. 608; dissenting opinion of Cardozo, J., in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 448; *State ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116; *United States v. Ripley*, 7 Pet. 18, 25.

Dickinson, in *Administrative Justice and the Supremacy of the Law*, 1927, formulates the criterion as follows:

"The essential difference between legislation and adjudication is not that one looks to the future and the other to the past—there is nothing inherent in the judicial process which requires that it should look wholly backward. Nor may the term adjudication properly be limited to cases of controversy between private individuals with an agency of government intervening as arbiter—such a definition would deprive every criminal trial of judicial character. What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity" (p. 20-1).

"Confusion seems to have crept into most of the attempts of the courts to define legislative and judicial power from a failure to keep separate two different distinctions: (1) the distinction between present and future operation; and (2) the distinction between the announcement of a general rule without reference to any particular case, and the application or elaboration of a rule to fit a specific case" (footnote 36, p. 21).

See also Freund, *Administrative Powers over Persons and Property*, 1928, pp. 14-5; Goodnow, *Principles of the Administrative Law of the United States*, 1905, pp. 28-9; Comer, *Legislative Functions and National Administrative Authorities*, 1927, pp. 27-8 (but see p. 47); Port, *Administrative Law*, 1929, Chap. III, pp. 88-119; Blachly and Oatman, *Administrative Legislation and Adjudication*, 1934, p. 1; *Report of Committee on Ministers' Powers*, 1932, pp. 18-20; *Report of the President's Committee on Administrative Management*, Part II, *The Exercise of Rule-Making Power* (by James Hart), p. 319; *Report of Attorney General's Committee on Administrative Procedure* (S. Doc. 8, 70th Cong., 1st Sess. 119), pp. 97 et seq.

The moment this test is applied and an "order" is found to be truly legislative, entirely different notions of procedure come into play, and the relationship between the legislating agency and the courts undergoes a fundamental change. The legislature may, if it chooses, subject the process to quasi-judicial procedure, but it has done so only rarely. When such procedure has not been prescribed, it has been held unnecessary.

"Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. * * * There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441, 445.

See also *Buttfield v. Stranahan*, 192 U. S. 470; *Red "C" Oil Manufacturing Co. v. Board of Agriculture of North Carolina*, 222 U. S. 380, 394-5; *Opp Cotton Mills, Inc., v. Administrator*, 312 U. S. 126, 145, 152.

Even when a hearing procedure has been prescribed, it has frequently been interpreted as not implying the quasi-judicial model or requiring procedural due process. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *Pacific States Box and Basket Co. v. White*, 296 U. S. 176; *United States v. Bush & Co.*, 310 U. S. 371, 379-80; compare *Prentis v. Atlantic Coast Line Co.*, *supra*, at p. 227.

Appellate review of purely legislative (and partly legislative) determinations has been deemed not within the province of constitutional courts. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428; *Federal Radio Commission v. General Electric Company*, 281 U. S. 464. Cf. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. The scope of judicial control over such determinations, in the few cases in which it has been exercised,

has been confined to exceedingly narrow limits, and the area of administrative finality stops just short of being exclusive.

"The Court below was clearly right when it observed that if, as the complaint alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them. A law cannot be declared invalid because, in the opinion of the court, it does not accord with sound policy. The appeal for redress in such case must be to the lawmaking power" (White, C. J., in *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394-5).

See also *Buttfield v. Stranahan*, 192 U. S. 470, 497; *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 484, 487; *P. F. Peterson Baking Co. v. Bryan*, 290 U. S. 570, 575-6; *Mississippi Barge Line Co. v. United States*, 292 U. S. 282.

C. The Word "Order" Should Not Be Extended to Include Purely Legislative Determinations.

We recognize that governmental machinery should be at hand to provide the necessary check on administrative rule-making of a purely legislative character to keep it within constitutional and statutory limitations. The present question, however, is whether the Urgent Deficiencies Act and Section 402(a) of the Communications Act do, or were intended to, provide this check.

We submit that the scope of the term "order" was intended to be, and should be, confined to (a) final orders entered as the result of proceedings conforming to the quasi-judicial model, prescribed by statute (including notice, hearing, and findings based on substantial evidence within the record), and (b) final orders, whether particular or general in form, designed to secure information necessary to the performance of the administrative tribunal's sub;

stantive regulatory functions. The first of the foregoing may be extended to, but should not go beyond, final orders legislative in nature or form, which are subject to a statutory prerequisite of quasi-judicial procedure.

In support of this construction are the following considerations:

1. The term "order", while admittedly employed in connection with a confusing variety of administrative actions, has not ordinarily been used to denote the determinations of legislatures in enacting statutes, and is most frequently and naturally employed to denote a command or prohibition directed to individuals.

2. As developed above, the decisions of this court over a period of 55 years since the establishment of the Interstate Commerce Commission have only rarely, if at all, extended the scope of direct attack by injunction to legislative determinations.

3. Except for Title III of the Communications Act, the statutes to which the Urgent Deficiencies Act has been made to apply have contained very few delegations of power to make purely legislative determinations; there has usually been a statutory requirement of quasi-judicial procedure.

4. Without prerequisite hearing and a record containing the evidence on which the determination was based, it is difficult to foresee the extent to which the parties will be permitted, or the courts will require, the production of evidence as the basis for ascertaining whether constitutional or statutory limitations have been exceeded, and even then it will be difficult for any administrative agency to bring into court evidence embodying the informed experience, expertness and investigation, on which its regulations may be based.

5. Each legislative determination will be automatically subject to possible review, accompanied by tempo-

rary injunction, in courts anywhere and everywhere over the entire country, at the suit of persons not parties to any proceeding before the Commission (there having been none), with consequent likelihood of conflicting results and hampering delays.

6. Many persons may be encouraged to file petitions with the administrative tribunal, seeking repeal, modification, or relaxation of regulations; it would be only logical that the tribunal's "orders" on such petitions should likewise be brought within the scope of the Urgent Deficiencies Act and Section 402(a), raising difficult questions as to the record to be brought before the court and the scope of review.

7. Presumably the court's decision on review of such a regulation at the suit of one party will not stand in the way of an attack on the regulation by another party when it is sought to be applied to him in a later proceeding of a judicial or quasi-judicial character.

8. Rule-making, that is, the reduction of standards to written, published formulations (as distinguished from the case-to-case method of making law) should not be discouraged by unnecessary obstacles. The process furnishes safeguards of its own, due to the public announcement of a general rule to be uniformly applied.

Other considerations may suggest themselves but the foregoing are sufficient to give pause.

Opinions differ as to the desirability, the method, the proper form, and the extent of review (whether administrative or judicial) of purely legislative determinations by appellate tribunals. It may rightly be regarded as one of the most difficult problems of political science under our scheme of government. The problems are not solely of securing the needed checks on excess of power, but have also to do with uniformity, consistency with the legislative determinations of other administrative and executive agen-

cies, and national policy, not to mention good draftsmanship, proper publicity, and accessibility of rules to those affected.

One of the chief grounds of criticism of the so-called Walter-Logan Bill (H. R. 6324, 76th Cong.), which passed both Houses of Congress but was vetoed by the President early in January, 1941, was that it provided for substantially the same character and measure of review of purely legislative determination as is now claimed for the Urgent Deficiencies Act. *Hearings before Subcommittee of House Committee on the Judiciary*, on H. R. 4236, H. R. 6198, and H. R. 6324, Mar. 17 and Apr. 5, 1939, 76th Cong., 1st Sess. The review provided by the bill was limited as follows (Section 3)—

“No rule shall be held invalid except for violation of the Constitution or for conflict with a statute or for lack of authority conferred upon the agency issuing it by the statute or statutes pursuant to which it was issued or for failure to comply with section 2 of this Act.”

Those who drafted the bill were frankly apprehensive over claims of unconstitutionality, since in the earlier drafts they designated the Court of Claims, and in the later drafts, the United States Court of Appeals for the District of Columbia (both legislative courts), as the reviewing tribunal. *Reports of American Bar Association*, Vol. 62 (1937), pp. 791, 816, et seq., 847, and Vol. 63 (1938), p. 363. The subject of “Judicial Review of Regulations” is ably discussed in the *Report of the Attorney General’s Committee*, pp. 115-120, but even the very mild recommendations incorporated in the two bills proposed by the majority and the minority of the Committee with respect to rule-making procedure and (in the minority bill, p. 230) judicial review by declaratory judgment narrowly confined, encountered a storm of objection and criticism from the representatives of federal administrative agencies. *Hearings before Subcommittee of the Senate Committee on the Judiciary*, on S. 674, S. 675 and S. 676, April 2 to July 2, 1941.

Under the circumstances, with the issue still under study by the Congress (although apparently in abatement because of the war), a result equivalent to that sought in the Walter-Logan Bill should not be deemed to have been intended by the Congress when it enacted the Urgent Deficiencies Act of 1913 (or its predecessor statutes), or Section 402(a) of the Communications Act of 1934. The scope of the Urgent Deficiencies Act and of Section 402(a) may, with greater logic and far less hazard, be confined within the limits above suggested, leaving it to the Congress to determine whether and to what extent direct judicial (or administrative) supervision of the rule-making process should be provided.

III.

In Any Event, the Order Complained of is not a Reviewable Order Under Section 402(a) of the Communications Act.

The statutes to which the judicial remedy provided by the Urgent Deficiencies Act has been extended are enumerated in *United States v. Griffin*, 303 U. S. 226, 235-6. Without attempting a minute analysis, we know that (except for Title III of the Communications Act) they contain relatively few provisions authorizing the making of rules and regulations of a substantive character. For the most part, the quasi-judicial model set by the original Interstate Commerce Act has been followed, with notice and hearing made prerequisite to administrative action.

It is not surprising that, with this background, the judicial remedy provided by the Urgent Deficiencies Act should have been extended to a few instances of orders which come close to, or fall within, the legislative classification, without serious objection or argument. Such treatment of orders prescribing "rules" for a limited class of persons where the statute makes hearing prerequisite, or where they are of the ancillary character represented by uniform systems of accounts, constitute a reasonable compromise with abstract theory.

Even so, there have been orders which, though of unquestioned finality, have been held not within the scope of the remedy. *United States v. Griffin, supra*; *Great Northern R. Co. v. United States*, 277 U. S. 172. See also *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401.

It cannot be assumed, therefore, that the cross-reference to the Urgent Deficiencies Act, contained in Section 402(a) of the Communications Act, conclusively determines the interpretation to be given the section as all-embracing. There may be final orders of the Federal Communications Commission not open to direct attack in the courts under either Section 402(a) or 402(b), depending on the intent of Congress. Evidences of that intent, drawn from legitimate sources under recognized canons of statutory interpretation, are at hand.

"In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission" (*United States v. Griffin, supra*, p. 233).

Pursuing the same method of ascertaining the Congressional intent as that followed in *United States v. Griffin, supra*, we are compelled to the conclusion that Section 402(a) does not extend to the purely legislative determinations of the Commission under Title III. The method included examination of the provisions of the Railway Mail Pay Act, its background and legislative history, its purposes, and the character of orders entered under it. It may appropriately be applied to Title III of the Communications Act, which is a statute separate in origin and history from Title II.

.A. Orders under Title II of the Communications Act.

Titles II and III of the Communications Act were brought together in 1934, one from the Interstate Commerce Act and the other from the Federal Radio Act of 1927, the former accompanied by Section 402(a) and the latter accompanied by Section 402(b). *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, — U. S. —, April 6, 1942;⁶ *Federal Communications Commission v. Columbia Broadcasting System, Inc.*, 311 U. S. 132.

The provisions of Title II, entitled "Common Carriers," are obviously reproduced or adapted from the parent statute, the Interstate Commerce Act. They are closely parallel in phraseology, and their purpose is identical (*Federal Communications Commission v. Sanders Bros.*, 309 U. S. 470, 474); it may be assumed that Title II comes clearly within the following general description of statutes to which the Urgent Deficiencies Act has been made available—

"The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Commission Act fixing rates payable by shippers" (*United States v. Griffin, supra*, p. 237).

Where orders of the Interstate Commerce Commission have been held reviewable, similar orders by the Federal Communications Commission under Title II will likewise be reviewable.

⁶ For simplicity, reference will be omitted to other regulatory authority which was centralized by the Act in the Commission, principally certain powers of the Postmaster General under the Post Roads Act of 1866, and the elaborate amendment of May 20, 1937, introducing Part II of Title III entitled "Radio Equipment and Radio Operators on Board Ship."

B. Quasi-Judicial Orders Under Title III of the Communications Act.

There are four kinds of orders under Title III, all quasi-judicial and not legislative in character, which are reviewable under Section 402(a) and not Section 402(b): (1) orders revoking licenses, after notice and opportunity for hearing, under Section 312(a); (2) orders modifying licenses on the Commission's initiative, after notice and opportunity for hearing, under Section 312(b); (3) orders disposing of applications for the Commission's approval of transfers of licenses or construction permits under Sections 310(b) and 319(b); and (4) orders disposing, after notice and hearing, of applications under Section 325(b) and (c) for permits to "export programs." That these are reviewable under Section 402(a) is settled, at least with respect to the first three kinds, by *Scripps-Howard Radio Inc. v. Federal Communications Commission*, *supra*; and that such reviewability was intended by the Congress is evidenced by the references to the statute's legislative history in footnote 3 of the opinion in that case (particularly 78 Cong. Rec. 8825-6). It may be assumed that the same conclusion would be reached with regard to the applications covered by Section 325(b) and (c), similar in character to the applications made appealable under Section 402(b).

That Congress intended to go no further is demonstrated, we submit, by the immediate legislative background of Section 402(a) and (b).

The Communications Act of 1934 had its origin in the filing of companion bills in the Senate and House of Representatives, S. 2910 and H. R. 301, 73d Cong., 2d. Sess. S. 2910 was amended after hearing and introduced as S. 3285 which, as further amended, was enacted into law. The Conference Report accompanying S. 3285 (No. 1918; 78 Cong. Rec. 10988) states with respect to this section (pp. 49-50):

"The Senate bill (sec. 402), for the purpose of cases involving carriers, carries forward the existing method

of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Every implication in the foregoing is that the Congress considered that with exceptions of the character above noted, no order under Title III was to be placed on the same footing as orders under Title II. The committee hearings, the committee reports, and the debates preceding the enactment of the Communications Act of 1934, and, indeed, of all bills relating to radio or to communications introduced prior to 1934, may be searched in vain for the slightest evidence of any intention, desire, or understanding that the legislative determinations of the Commission in regulating radio should or would be made subject to direct judicial review.

C. Legislative Determinations Under the Radio Act of 1927.

Title III of the Communications Act, together with Section 402(b) and scattered sections in Titles I, V and VI, constitutes an almost verbatim reproduction of the Radio Act of 1927, 44 Stat. 1162. Section 303 of the Act, on clauses (f) and (i) of which the Commission's power to make the regulations now in question largely depends, is a verbatim reproduction of Section 4 of the Radio Act, enlarged by the addition of several clauses not relevant to this discussion. See Appendix, *infra*.

Section 16 of the Radio Act of 1927, relating to appeals, was the only provision in the Act for court review. It ac-

corded an appeal to what is now the United States Court of Appeals for the District of Columbia *only to applicants* for construction permit, license, renewal, or modification, *whose applications had been denied*; it also accorded an appeal to that Court or "to the district court of the United States in which the apparatus licensed is operated" to any licensee whose license had been revoked. No appeal was accorded to any person adversely affected by the *granting* of an application.⁷

Because of the broad scope of review lodged in the Court of Appeals by the original Section 16, this Court held that the provision "does no more than make that court a superior and revising agency in the" administrative field. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 467. The Act failing to make provision for persons adversely affected by the *granting* of applications, or for interested parties to participate in the appellate proceedings, a preliminary injunction was granted against the Federal Radio Commission by the Supreme Court of the District of Columbia and, on appeal, the granting of the preliminary injunction was held not error. *Saltzman et al. v. Stromberg-Carlson Tel. Mfg. Co.*, 46 F. 2d. 612 (App. D. C.). See also *Baltimore Radio Show, Inc. v. Federal Radio Commission*, Journal of Radio Law, Vol. I, p. 120. Attempts by *applicants*, however, to resort to relief by injunction uniformly failed. *White v. Federal Radio Commission*, 29 F. 2d. 113, D. C. Ill. (see *White v. Johnson*, 282 U. S. 367); *United States v. American Bond & Mortgage Co.*, 31 F. 2d. 448, D. C. Ill. (see 282 U. S. 374 and 52 F. 2d. 318, C. C. A., 7)

In 1930, Section 16 was amended (1) so as to limit the scope of review to one of judicial character, (2) to afford the right of appeal, and the right to participate in appeals, to persons other than applicants, and (3) to confine appeals in revocation cases to the Court of Appeals, 46 Stat. 844.

⁷ The Radio Act contained no provisions corresponding either to Section 312(b) or Section 325 (b) and (c).

There were other changes not relevant to this discussion. In 1934 this amended Section 16 was carried forward almost verbatim into Section 402(b) of the Communications Act *except* that, for reasons already explained, review of revocation orders under Section 312(a) was intentionally placed back in the district courts where it had originally been, and the same provision was made for modification orders under Section 312(b). In the interim between 1930 and 1934 there had been outspoken complaint against the amendment of 1930 because of its forcing licensees to come to Washington on appeals from revocation orders (see, for example, the remarks of Senator White on February 28, 1933, 76 Cong. Rec. 5208).

There were several attempts during this period to resort to the United States District Court in the District of Columbia for injunctive relief but they were unsuccessful. *Sykes et al. v. Jenny Wren Co.*, 78 F. 2d. 729 (App. D. C.), cert. den. 296 U. S. 624; *Monocacy Broadcasting Co. v. Prall et al.*, 90 F. 2d. 421 (App. D. C.); *Black River Broadcasts, Inc. v. McNinch et al.*, 101 F. 2d. 235 (App. D. C.), cert. den. 307 U. S. 623. In the last of these, rendered Nov. 21, 1938, the Court of Appeals said (p. 237):

"In the Act, Congress has made this court the sole appellate body (with right to petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

In the meantime, in a large number of cases taken before the Court of Appeals by the route provided in the original Section 16, in the amended Section 16 of the Radio Act prior to 1934, and in Section 402(b) since then, the validity of regulations of the Commission has been questioned, considered, and discussed. This was true of *Federal Radio Commission v. Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 281.

It was also true of *General Electric Co. v. Federal Radio Commission*, 31 F. 2d. 630 (cert. dismissed 281 U.S. 464); *Carrell v. Federal Radio Commission*, 36 F. 2d. 117; *Chicago Federation of Labor v. Federal Radio Commission*, 41 F. 2d. 422, 423; *Courier-Journal Co. v. Federal Radio Commission*, 46 F. 2d. 614; *Durham Life Ins. Co. v. Federal Radio Commission*, 55 F. 2d. 537; *Pacific Development Radio Co. v. Federal Radio Commission*, 55 F. 2d. 540; *Eastland Co. v. Federal Communications Commission*, 92 F. 2d. 467, 471-2; *Pittsburgh Radio Supply House v. Federal Communications Commission*, 98 F. 2d. 303, 306; *Woodmen of the World Life Ins. Soc. v. Federal Communications Commission*, 105 F. 2d. 75, 78; *Colonial Broadcasters, Inc. v. Federal Communications Commission*, 105 F. 2d. 781; *Tri-State Broadcasting Co. v. Federal Communications Commission*, 107 F. 2d. 956, 958; and *Ward v. Federal Communications Commission*, 108 F. 2d. 486, 490-1. Many appeals have been taken under these provisions, approximately 44 before July 1, 1934 and 39 since then, by many different persons and interests, represented by a number of different lawyers. Those dissatisfied with the workings of the statute have never hesitated to make known their criticisms and suggestions in the Congressional hearings on the subject of radio which have taken place not less than an average of once every two years since 1923. Never once prior to 1934 was any suggestion made that the Radio Act of 1927 was defective in not providing for direct judicial review over the Commission's orders adopting regulations in the field of radio. Never once since then (until now) has anyone deemed Section 402(a) applicable to such an order.

The salient fact in this history is that, when the Radio Act was merged into Title III of the Communications Act, it provided no such remedy. Its procedural provisions were entirely built on, and related to, hearings on applications, revocations and appeals from orders resulting therefrom. Nowhere in Title III is any hearing required as prerequisite to the adoption of a regulation, with an irrelevant excep-

tion made in Section 303(f)⁸. Nowhere is there the slightest implication that, if hearings are held prior to adopting regulations, they should be on the quasi-judicial model. Throughout, there is a studied contrast between actions on applications (or revocations) and the adoption of regulations.

D. Nature of the orders involved.

The regulations of the Federal Communications Commission constitute Title 47 of the Code of Federal Regulations of the United States and, as of June 1, 1938, occupied almost an entire separate volume, with a total of 478 out of 487 pages. Its regulations account for 78 pages in the 1938 Supplement and 257 pages of fine print in the 1939 Supplement. Since then a large number of further regulations have been issued, covering a variety of subjects in the rapidly advancing radio art, with special reference to such matters as television, high frequency broadcasting, including frequency modulation, and many others. They are constantly being supplemented, and are available in pamphlet form in an impressive series of pamphlets covering separate subjects (see list in 7th Ann. Rep. of FCC, 1941, p. 66).

Reference to the 1939 Supplement will sufficiently serve to reveal the character of the regulations. Of the 257 pages, the first 28 have to do with practice and procedure, and a portion of the last 26 have to do with common carrier matters, principally the filing of contracts and periodic reports, and rules governing tariffs, and much of that is procedural. Virtually all the remaining pages are filled with regulations of a substantive character, sometimes expressed in the form of outright prohibitions or commands, and just as frequently (if not more so) in the form of policy declarations like the regulations now complained of.

⁸ Changes in the frequencies, authorized power, or times of operation, without the consent of the licensee, are made subject to hearing. This is simply the counterpart of Section 312(b).

A substantial portion of the regulations are required by treaties to which the United States is a party. Examples of such treaties are the North American Regional Broadcasting Agreement (Treaty Series 962), signed at Havana, 1937, the International Telecommunications Convention (Treaty Series 867), signed at Madrid, 1932, and the General Radio Regulations (Treaty Series 948), signed at Cairo, 1938. Further regulations are required by international arrangements of an executive character, constantly being made between the administrative authorities of the several countries, usually pursuant to provisions in the treaties and the obligations imposed thereby.

The limited number of common carriers subject to the Commission's jurisdiction is indicated by the fact that 216 companies filed annual reports, and 115 of these filed monthly reports, for the year 1940, including a number of telephone carriers that are not subject to the complete jurisdiction of the Commission. Of the 115, 98 were telephone carriers, 8 were wire-telegraph or ocean-cable carriers, and 9 were radiotelegraph carriers (7th Ann. Rep., 1941, p. 64).

In contrast with these figures, there were, as of June 30, 1941, 1,545 radio stations belonging to the broadcasting and related classifications (television, high frequency, international, facsimile, etc.), 12,632 radio stations of other services (aviation, ship, police, fire, point-to-point, coastal, geological, etc.), and over 50,000 amateur licenses (7th Ann. Rep., 1941, pp. 53, 62, 63). The foregoing are in addition to approximately 80,000 radio operator licenses, the operators being, of course, all subject to the Commission's licensing authority and regulations (*ibid.*, p. 50).

Under Section 606(c) of the Act, upon proclamation by the President of war or other national emergency,

"the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission."

Under Section 305(a), Government stations, with immaterial exceptions,

"shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe."

Under Section 312(a)

"Any station license may be revoked . . . for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States"

Under Section 502, wilful and knowing violation of any of the Commission's rules or regulations is made a penal offense. Under Section 303(m), the Commission may, after hearing, suspend the license of any operator for violation of any of the Commission's regulations. When these provisions are considered in conjunction with the quasi-judicial provisions for hearings on applications under Sec. 309(a), there is certainly no lack of a forum in which to contest the Commission's legislative determinations.

The many clauses in Section 303 contain the bulk of the Commission's regulation-making powers. There are, however, additional powers of this character in Sections 4(i), 308(b), 315, 319(a), and 325(e). The only standard imposed by Congress on the Commission as a guide is the broad test of "public convenience, interest or necessity" in the introductory portion of Section 303. The broad dimensions of these powers, both in subject-matter and in standard, are in striking contrast to the few and narrowly-defined regulation-making powers conferred by Title II, and by the other statutes to which the Urgent Deficiencies Act has been made applicable. The standard "public convenience, interest or necessity," taken with the subject-matter, admits and requires a large measure of discretion in a highly technical and rapidly advancing scientific art, in which not only the contents but the boun-

daries of the discretion will be difficult to discover except in the framework of a concrete application of the Commission's policy in a particular case.

In arriving at its legislative determinations the Commission has, over the years, employed all the usual methods for the securing of information, including investigations in the field (which, in turn, have included countless thousands of observations and measurements with technical apparatus), questionnaires, data exchanged with foreign countries, conferences with interested groups and experts, informal hearings, and formal hearings. The hearing in the instant case, resulting in a record of 8,713 pages and 707 exhibits, while of course larger than the average, is only one of a number of huge records built up in such proceedings where they have been held.

In none of these matters was a hearing required by statute. The same determinations could have been made on the basis of information secured by informal methods (as it has been in other important sets of regulations adopted by the Commission), with no record setting forth the considerations and facts leading to the result. Under present conditions, indeed, it would not be proper to make some of the considerations public; and yet very important legislative enactments are being made from week to week, seriously affecting the persons subject to the Commission's regulatory powers.

In the court below, counsel for appellants clearly indicated that it was their conception of the review accorded by Section 402(a) that it permitted a complete factual showing by appellants in support of the claim that the Commission had exceeded its powers and in so doing had deprived appellants of their rights. It is difficult to conceive of any factual showing which would not duplicate, in whole or in part, the record made before the Commission in this case and, if any important facts are lacking in that record, it can only be due to appellants' failure to present all the available material evidence to the Commission.

Suppose, however, there had been no hearing and there were no formal record? Is the door to be thrown open to an extended judicial hearing of the sort sought by appellants? Once such a review is permitted, within what limits can it be confined? How can suits brought under Section 402(a) be prevented from becoming an effective weapon to subject the Commission's regulations to interminable delays, and to countrywide diversities of judicial rulings?

CONCLUSION.

It is submitted that the judgments of the district court should be affirmed.

Respectfully,

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APPENDIX.**THE COMMUNICATIONS ACT OF 1934**(47 U. S. C. §§ 151 *et seq.*)**TITLE I.****GENERAL PROVISIONS.**

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“§ 154. Federal Communications Commission; composition and provisions relating thereto generally

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“(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”

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TITLE II.**COMMON CARRIERS.**

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TITLE III.**PROVISIONS RELATING TO RADIO,***Part I. General Provisions.*

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“§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

“(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual sta-

tion and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(1) Have authority to prescribe the qualifications of station operators; to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has wilfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been

given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

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 "§ 305. Government owned stations; regulations; stations on vessels; call letters

(a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this chapter. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe."

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 "§ 308. Same (licenses); application; conditions and restrictions in license for foreign communication

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership

and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

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"§312. Same (licenses); revocation and modification; notice and hearing

(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided; however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may

prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation."

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 "§315. Candidates for public office; facilities.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

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 "§ 319. Construction permits; licenses for operation

(a) No license shall be issued under the authority of this chapter for the operation of any station the construction of which is begun or is continued after this chapter takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected

to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation."

"§ 325. False distress signals; rebroadcasting programs; studios for broadcasting to foreign countries for rebroadcasting to United States; permit

(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States without first obtaining a permit from the Commission upon proper application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest."

PART II. RADIO EQUIPMENT AND RADIO OPERATORS ON BOARD
SHIP

TITLE IV.

PROCEDURAL AND ADMINISTRATIVE
PROVISIONS

TITLE V.

PENAL PROVISIONS: FORFEITURES

"§ 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs."

TITLE VI. MISCELLANEOUS PROVISIONS

" § 606. War powers of President

(c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners."

SUPREME COURT OF THE UNITED STATES.

No. 1025—OCTOBER TERM, 1941.

National Broadcasting Company, Inc.,
Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Appellants,

vs.

The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc.

Appeal from the District Court of the United States for the Southern District of New York.

[June 1, 1942.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 1026, *Columbia Broadcasting System, Inc. v. United States*, decided this day. Both present substantially similar facts and the same issues of law.

Appellant, National Broadcasting Company, maintains two radio broadcasting systems, the "blue network" and the "red network". The two other appellants operate radio broadcasting stations licensed by the Communications Commission, and have entered into contracts with National similar to those involved in the *Columbia* case and to those of other stations which participate in National's networks.

Appellants brought the present suit in the Southern District of New York to set aside the order of the Commission of May 2, 1941, as amended by its order of October 11, 1941, promulgating the Chain Broadcasting Regulations which we considered in the *Columbia* case, on the grounds that the order is beyond the Commission's statutory authority or, if within it, that the statute is an unconstitutional delegation of the legislative power of Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellants of property without the due process of law guaranteed by the Fifth Amendment.

The district court of three judges dismissed the complaint; — F. Supp. —, holding that the Commission's order is not reviewable under the provisions of § 402(a) of the Communications Act of

2 *National Broadcasting Co., Inc. vs. United States et al.*

1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 28 Stat. 219, 28 U. S. C. § 47, but stayed the operation of the order pending direct appeal to this Court.

According to the allegations of the bill of complaint, National conducts its broadcasting business in substantially the same manner as Columbia. It establishes telephone wire connections with licensed broadcasting stations with which it enters into contracts for limited periods for chain broadcasting of its radio programs. These contracts do not require that the station shall broadcast the programs of no other chain than National. But a feature of them is the option given to National for use of the station on 28 days' notice for certain specified periods of radio time in broadcasting commercial network programs provided by National. It is alleged that because of the contract provisions the regulations will require the stations affiliated with National to abandon their contracts or lose their licenses either by the Commission's cancellation of or refusal to renew them. The bill of complaint makes a sufficient showing of irreparable injury to National, including an allegation that forty-eight affiliated stations have served notice of abrogation of the contracts.

For the reasons stated at length in the opinion in the *Columbia* case, we hold that the order of the Commission is reviewable in the present suit by the district court of three judges. The bill of complaint states a cause of action in equity. The judgment will accordingly be reversed and the cause remanded for further proceedings.

Unlike the *Columbia* case, the record discloses no facts showing what effect the Commission's minute adopted after the present suit was brought has had or will have upon the cancellation of appellants' contracts by the affiliated stations. So far as relevant that will be a matter for consideration by the court below, as will be the question, not considered here, whether the appellants other than National are proper parties plaintiff.

As in the *Columbia* case the stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Mr. Justice REED, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS dissent for the reasons set forth in the dissenting opinion in No. 1026.

